OFFENCES AGAINST THE INTERNATIONAL COMMUNITY ACCORDING TO THE SPANISH PENAL CODE

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I. INTRODUCTION

The new Section XXIV of Book II of the Spanish Penal Code, under the title "Offences against the International Community", covers four chapters concerning *Ius Gentium*, genocide, offences against protected persons and property in the event of armed conflict and certain provisions common to the infringements in question.

A clearly substantive novelty and another that could apparently be called formal, without a doubt make up the fundamental innovations of the new Penal Code approved by Organic Law 10/1995, dated 23 November, concerning this subject.[1]

The first and most important innovation – for what it implies in theoretical progress, as much as for its potential practical effects – is a new Chapter on offences committed in a situation of armed conflict, which will be specifically discussed in this article. The second innovation is an alteration that concerns the change of *nomen iuris* of the Section discussed. In fact, if the classifications had been placed till now under the heading "Offences against National Security", after the most recent changes the Spanish legislator has included these offences under "Offences against the International Community".

As mentioned above, this change in the name of the Section should be related to something more than just a simple adjectival variation. In fact, this formal modification would seem to presage a qualitative step forward in the Spanish conception of law-making. It could even be a question of the definitive step from a kind of nationalist conception that classifies conduct with international elements or with undeniable foreign ingredients, but only inasmuch as they can be harmful to National Security itself, towards a real internationalist view that is prepared to reproach penal conduct that impairs the legal rights protected by all or part of the international community.[2]

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1. *BOE*, 24 November 1995. Entry into force of the Law will be as provided by Organic Law 10/1995 itself, six months after publication.

2. Similarly, F. Muñoz Conde may be mentioned who, following Quintano Ripollés, speaks of a possible double perspective in the protection of the International Community: The traditional perspective and the innovative and wholly international one. Whereas the former would be agreed upon from a domestic angle by the States themselves, under equally domestic laws though aimed beyond their frontiers, the latter would be drawn up by the international community itself or in its name; *cf. Derecho Penal. Parte Especial, 8th* ed., Tirant lo Blanch, Valencia, 1991, p. 591.

In fact, when this penal expert was trying to adjust the Spanish Penal Code prior to the latest reform in this direction, he seemed to indicate that nothing much had been achieved: "our laws are still in the traditional phase, for they punish these offences only inasmuch as they affect the nation itself. The International Community may only be considered as the directly affected victim where genocide is concerned"; *ib.*. Following approval of the new Code, opinion does not seem to have altered much. The model is still the traditional one, though it recognizes that "standards of International Law ratified by Spain have been of influence..."; *cf.* F. Muñoz Conde, *Derecho Penal. Parte Especial,* 11th ed., Tirant lo Blanch, Valencia, 1996, p.652.

However, notwithstanding that the Spanish legislator has in fact rightly decided to bring our penal system into line with International Humanitarian Law and consequently, to classify new categories of behaviour when carried out in wartime, he has not yet ventured final conclusions in this line of coordination with other branches of International Law, common or conventional, that are likewise binding.

This lack of determination has meant that the types of prohibited behaviour are, to say the least, insufficient, as the case has been until now, from the point of view of international laws. Furthermore, it has also implied that the array of offences listed suffers from a higher degree of incongruity with the Section under which it is included.

It is true that offences against internationally protected persons and genocide offences were considered as "offences against *Ius Gentium*" in the previous code, there being a separate Chapter on the subject. However, it must not be forgotten that said Chapter was included under Section (I) concerning offences that the state, formally, only considered harmful to its own national security. On the other hand, if the legislator had intended to dispense with a purely domestic conception in the code currently in force, as might be implied from incorporation of the new heading, which openly mentions protection of the international community. The result is a visibly weak approach that has merely been satisfied with the addition, however laudable, of a chapter concerning infringements committed in times of armed conflict. Thus, at present the contents of Section XXIV do not even honour their formal denomination.

To our way of thinking, the latest reforms to the Spanish Penal Code provided an excellent opportunity for the country to renew, internally, the contents of its international commitments and, what is more important, to establish the substantive domestic penal bases in conformity with the existing and mandatory ones according to International Law. This would meet international obligations and it would leave the way open, from a domestic angle, for International Law to punish conduct, fully respecting the necessary application of legality in our criminal law. In short, this wasted opportunity is certainly unfortunate. However, the reasoning behind this criticism should be taken and understood from the specific angle of International Criminal Law, though acknowledging that it perhaps includes the most primitive and precarious branch of Public International Law.[3]

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3. Most deficiencies and vacuums in this legal system are no doubt due to the well-known and marked national reticence to give up portions of sovereign power. However, we think that from an objective point of view, many vacuums may also be attributed simply to its recentness and youthfulness inasmuch as the network of existing treaty instruments did not begin to interact uninterruptedly and solidly until the end of the Second World War.

There is some doctrinal work that provides a perfect account of the visibly incipient feature of this international legal area and of the implications inevitably implied. For a balanced view, the following, among others, are worth reading: Y. Dinstein, "The Parameters and Content of International Law", *Touro*

The fact is that, in spite of the many vacuums and that it is still in a stage of formation and consolidation of many of the fundamental aspects, International Criminal Law is already undeniably provided with ample points of Common Law, as well as Conventional Law, that cover an ever greater number of infringements considered offensive by a large part of the community of States, though not for all. Be that as it may, all those categories of behaviour included by one or another source of international laws constitute real international offences.

Consequently, given the general precedence of International Law over National Law, with the resulting effects on an international level to be drawn in the event of non-compliance, on one hand,[4] and the operation of the principle of legality from the national aspect on the other, our country should take supreme care when it comes to adjust its legal system to the requirements imposed by International Criminal Law.

It is true, however, that on many occasions it becomes very difficult to extract the dictates of state conduct immersed in International Customary Law (specially where it concerns satellite aspects of the main offence, definition of the manner of participation in an offence, the causes of exemption or of extenuating circumstances or the various procedural details), mainly in aspects that have not yet been codified. Nevertheless it is also true that other angles, among which the same selection of punishable conducts may be pointed out, the responsibility of a higher authority or the non exemption of responsibility, for so-called due obedience, as well as for the official character of the author, have been repeatedly and progressively analyzed over the last years at international forums, where the work carried out by the ILC is of special importance, together with that being included in the Draft Code of Crimes

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Journal of Transnational Law, vol.1 (1990-2), pp. 315–324 and C.R. Donovan, "The History and Possible Future of International Law", *Brooklyn Journal of International Law*, vol. 13 (1987), pp. 83–109.

4. In this context, the already classical principle established at Nuremberg should not be forgotten, just as it was drawn up by the ILC in regard to certain crimes: "Crimes against the peace and the security of mankind are crimes of International Law and punishable as such, whether or not they are punishable under National Law. In this way, significant derivations that have been developing since the Nuremberg Trials are condensed in a formulation: International Law as the basis for classification, the autonomy of the international legal system on this point, the direct applicability of International Law with the resulting individual responsibility and the insignificance of provisions – or lack of provisions – in National Law for legal international purposes; *cf. Report of the ILC on the work of its forty-eighth session*, 6 May to 26 July 1996, General Assembly, Official Records, (A/51/10) 1996, Article 1 and Commentary (the official text is available at: http://www.un.org/law/ilc/reports/1996/96repfra.htm).

For a detailed study of the peculiarities and available methods for carrying this adaptation into effect and, finally, for a desirable unification of domestic legal systems, one may refer to the excellent and ageless work of S. Glaser, *Droit international penal conventionnel*, vol. I, Établissements Émile Bruylant, Brussels, 1970, pp. 169–198.

against the Peace and Security of Mankind.[5] On the other hand, we must also keep in mind that, in respect of a conventional international legal system of a basic character, though dispersed and with clearly sectarian features, it is fully drafted and awaiting; for some time past, its gradual – and obligatory – inclusion in domestic law. Therefore, if we take a look at the range of treaties on penal matters in which Spain has taken part and which include a definition of an international offence, it is easy to see how, apart from classifying the conduct, they aim a direct and precise mandate at the State. In fact, attention is drawn to the fact that all these agreements impose an obligation upon the participant States to establish severe penalties or penalties

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5. The non-exemption of responsibility for acting in compliance with an order and the responsibility of the superior are matters that can be of particular importance with regard to offences against the international community classified in the Spanish Penal Code of 1995, specially those defined in Chapters II and II of Section XXIV (though also in what concerns another category of offences that in spite of not having yet been expressly provided for in the Spanish domestic penal system, to our way of thinking, should have been; vid., in this sense, paragraph II.A of this work concerning offences or crimes against mankind).

At this point of the century, it would be useless to repeat yet again that the principle of compliance with orders from above does not constitute a case for the exclusion of responsibility by the author of an offence. It became a legal reality internationally at the end of the Second World War (*vid.* Art. 8 of the Nuremberg Statute).

Being unable to assume, therefore, an exception to penal responsibility, the pleading of a case such as this can only be operative, if at all, as a factor for the mitigation of a punishment. In this line, Article 5 of ILC's Draft Code of Crimes against the Peace and Security of Mankind, "Order of a Government or a superior" and its commentary (which establishes that the mere existence of orders in no way acts as an automatic reason for imposing a lesser punishment and also what type of circumstances must exist for there to be such mitigation) are the most significant texts; *vid. Report of the ILC on the work of its forty-eighth session... cit.*, Article 5 and Commentary and also Article 23 of the Spanish Penal Code of 1995.

The question of responsibility of the superior, however, receives ever more attention where it concerns its negative or indirect dimension. This type of responsibility of the superior appears when an offence is committed by a subordinate in cases in which the former knew or had reason to know that an offence was being or was going to be committed and did not take all the necessary steps at his command to prevent it or to try to put a stop to it. This responsibility by omission is of special practical relevancy in cases of armed conflict. *Vid.* in this respect, articles 86 and 87 of Additional Protocol I of the Geneva Convention dated 12 August 1949, concerning protection of victims of international armed conflicts; Article 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia; Article 6 of the Statute of the International Criminal Tribunal for Rwanda and Article 6 of the Draft Code of Crimes against the Peace and Security of Mankind, "Responsibility of the superior" and its commentary, in *Report of the ILC on the work of its forty-eighth session... cit.*, Article 5 and Commentary.

appropriate to the serious nature of those offences.[6]

Therefore, there were sufficient International Customary and Conventional Laws providing clear guidelines concerning conduct that is to come under criminal classification in domestic law, at least when the domestic legal system is incapable of reacting – preventively and punitively – with the pre-existing provisions when faced with certain actions concerning which that system is under the obligation to adopt specific measures in accordance witb International Law. From this perspective, it may be argued that in spite of the fact that the Section of the Spanish Penal Code covering offences against the international community does not include classification of offences with undeniable foreign and international elements, such as drug traffic, the provisions existing in other regulations are sufficient to assume that Spain will comply with its obligation. From the same angle, however, the lack of regulation of other offences cannot be justified, in our opinion, if we keep in mind that this vacuum is not dealt with elsewhere in the legal system either.[7] The realization of this significant absence is, in fact, the stimulus for the following considerations.

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6. With no intention of being complete, the Tokyo Convention may be examined concerning infringements and other acts committed on board aircraft dated 14 September 1963 (*BOE*, 25 December 1969); Convention for the Suppression of Unlawful Seizure of Aircraft dated 16 December 1970 (Article 2; *BOE*, 15 January 1973); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation dated 23 September 1971 (Article 3; *BOE*, 10 January 1974); Convention for the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, dated 14 December 1973 (Article 2.2; *BOE*, 7 February 1986); International Agreement against the Seizure of Hostages (Article 2; *BOE*, 7 July 1984) or the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 (Article 5; *BOE*, 24 April 1992).

7. J.L. Rodriguez-Villasante Prieto detects an even greater vacuum in "Delitos contra la Comunidad Internacional" *Seguridad Nacional-Seguridad Internacional... VIII Seminario "Duque de Ahumada"* (7, 8 and 9 May 1996), Ministerio del Interior, Dirección General de la Guardia Civil/Universidad Nacional de Educación a Distancia, pp. 55–107, p. 56.

Internationalist doctrine has also found vacuums or, if preferred, matters that should be defined. In this context, there are the known successive drafts of the international code carried out privately by M.C. Bassiouni. It is enough to see an index, for example, that which has been translated into Spanish (Derecho Penal Internacional. Proyecto de Código Penal Internacional, translation, notes and annex by J.L. de la Cuesta Arzamendi, Tecnos, Madrid, 1989) in order to get an idea of the series of conducts that might or should be classified in domestic legal systems: war crimes, unlawful use of weapons, crimes against humanity, seizure of hostages, unlawful use of postal services, offences concerning drugs, theft of national and archeological treasures, corruption of foreign civil servants, interference with submarine cables, international traffic of obscene publications, op. cit. pp. 101–104 and following. Another similar work by the same author is *A Draft International Code and Draft Statute for an International Tribunal*, Martinus Nijhoff Publishers, Dordrecht, 1987.

II. OFFENCES AGAINST THE INTERNATIONAL COMMUNITY UNCLASSIFIED IN THE 1995 PENAL CODE

A. Offences or Crimes against Mankind

Unlike the recent past (the theoretic-legal history of these offences is really very short), international classification of a crime against mankind does not actually include the condition that this crime, for it to be considered as such, be committed in wartime.[8] In this way, legal international instruments in the penal field, such as the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Statutes of the International Criminal Tribunal for the former Yugoslavia[9] and Rwanda[10] or even the Draft Code of the ILC[11] deal with these crimes – or some of them – providing them with their own entity, laying down, therefore, a dividing line with respect to other crimes and avoiding the situation or circumstances of peace or conflict that surround their commission.

Starting on one hand, from a premise of the full actual autonomy of the crimes against humanity and, on the other, from the progressive increase of such conduct from the moment of its legal inception until the present,[12] we think that this category

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8. As we know, legal imperatives ("latest scruples of positivist legalism" in the words of A. Quintano Ripollés, *Tratado de Derecho Penal Internacional e Internacional Penal*, Tomo II, Consejo Superior de Investigaciones Científicas/Instituto Francisco de Vitoria, Madrid, 1957, p. 613) established that the classification of these new international offences be formally related to that of the other two categories of international acts following the Second World War: crimes against peace and war crimes. In this way, only offences committed since 1 September 1939 could be considered crimes against mankind in compliance with the Statute of London and, therefore, fall within the jurisdiction of the Nuremberg Tribunal. On the requirement of such connection, the commentaries of H.D. de Vabres may be seen, "Le procès de Nuremberg devant les principes modernes du droit pénal international" in *R. des C.*, t. 76 (1950-I), 433–605, specially pp. 515–522; A. Miaja de la Muela "El genocidio, delito internacional" in REDI, vol. IV (1951-2), 363–308, pp. 384–385; A. Quintano Ripollés, *Tratado... op.cit.*, t. II, pp. 607–623

9. See its Article 5.

10. See its Article 3.

11. See *Report of the ILC on the work of its forty-eighth session... cit.*, Articles 17–18 and Commentaries.

12. In this respect, it would suffice to compare the "actions or persecutions" included in Article 6 of the Statute of London of 1948 with those of Article 18 of the Draft Code of ILC. This second text containing a very much greater series of conducts, largely reflects no doubt, customary law on this question and as far as certain acts are concerned, it enables one to see at least in what direction the States *opinio iuris* is going. In this provision it is assumed that any of the following actions constitute crimes against humanity when they are committed systematically or on a large scale and instigated or directed by a government, political organization or group: "a) murder; b) extermination; c) torture; d) enslavement; e) persecution on political, racial, religious or ethnical grounds; f) institutionalized discrimination on racial, ethnic or

of truly international offences should be the object of specific domestic classification. This is a concrete precaution that we are missing in the Spanish Penal Code.

It is true generally, however, that international offences considered crimes against humanity (in either customary or conventional law, or in potential texts such as the Draft Code prepared by ILC) may be included more or less in other items foreseen in the Penal Code of our country (though if we followed this rule, it would not have been necessary either to classify genocide expressly, as assassination and injury were already included). However, not all this conduct would be covered by the domestic penal system. Where could we embody, with any expectation of finding a sanction wholly appropriate to the seriousness of the offence of, for example, extermination, apartheid, enslavement, deportation or forcible transfer of population or forced disappearance of persons?

The absence of substantive provisions, and also the lack of procedural provisions, can lead – if not to unjust judgments because the domestic system does not contain all the elements of international classification – to a paralysis of domestic legal action. Incidentally, for example, it is only one of these two endings, unfortunately in our opinion, that might apply in our courts to the cases of missing persons of Spanish nationality or of Spanish origin in Latin America.[13] Evidently the provision of an independent chapter concerning crimes against humanity would contribute to a higher level of material justice, as an appropriate and specific penalty could be imposed for this type of offence,[14] expecting thus that the possible subjective elements will be kept in mind, as well as the objective ones, whether foreign or international, which make

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religious grounds involving the violation of fundamental human rights and freedoms and resulting in seroiusly disadvantaging a part of the population; g) arbitrary deportation or forcible transfer of population; h) arbitrary imprisonment; i) forcible disappearance of persons; rape, enforced prostitution and other forms of sexual abuse; k) other inhumane acts which seriously impair physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm"; *Report of the ILC on the work of its forty-eighth session... cit.*, Supplement No. 10 (A/51/10), Article 18.

13. Apart from procedural disadvantages frequently generated by the application of the principle of universal jurisdiction (which basis of competence, let it not be forgotten, requires that the State that is ready to exercise it should count on the presence of the presumed author of the offence in its territory), the problems that may arise as to what is *substantive* and what is *procedural* should not be overlooked either, in these cases. Thus, if our Code included the specific classification of forcible disappearance or the generic specification of crimes against peace with, consequently, the corresponding provision of competence in Article 23.4 of the Organic Law on Judicial Power (*LOPJ*) it would no longer be necessary to resort to being obliged to find a corner for disappearances in the classification of genocide offences. In this context, see paragraph III.B.2 of this paper.

14. A variation of the sentence may not be avoided from State to State, which no doubt introduces a new factor of discrimination as the principle of universal jurisdiction now enters into it, owing to existing differences between penalties established in the various domestic systems. From another aspect, but still related to the same idea of establishing a specific and appropriate penalty for this type of offence, it may

up the context of their perpetration.

Furthermore, only with substantive provisions (that would classify these offences in detail) and procedural provisions (that wonld include application of the principle of universal jurisdiction)[15] in all domestic penal codes and with a sufficient dose of political willpower – in matters concerning legal cooperation, mutual legal assistance, extradition, or submission of a specific case by the executive power to the judicial power – could an effective international system be drawn up for prevention and legal sanction, that would palliate the structural deficiencies caused by the absence of a permanent international criminal court.

Nevertheless, the classification of crimes against humanity under its own Chapter would evidently mean important formal progress. On one hand, its incorporation would mean providing Section XXIV of the Spanish Penal Code with greater domestic coherence, specially if genocide were treated in its proper dimension, i.e. in its consideration as a crime – one of the crimes – against humanity, in a species-genus context.[16] On the other hand, the specific treatment of crimes against humanity in a Chapter of Section XXIV of the Penal Code would have the effect of providing the contents of the Section with congruence with its own title that it is now lacking, the

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perhaps be argued that the impossibility of reaching an agreement on the penalty/ies to be imposed or a margin for it/them at the moment of drawing up the Convention for the Prevention and Punishment of the Crime of Genocide of 1948 determined its absence from all later legal-international instruments of a penal characteristic, that do no more in these cases, than refer to the domestic systems (in spite of the fact that one may mention the example of an Agreement which, when it was being drawn up, contained another attempt to establish a penalty from the same international position: the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft –see the Italian and Austrian proposals in this context, in ICAO: Doc. 8979-LC/165-2 1970, p. 116–; doubtless the failure of this formula once again conditioned the lack of penalties in later regulatory texts).

15. As we know, the principle of universality may only be applied in respect of truly international offences whose main feature is that they seriously affect essential values of the international community in such a way that they are understood to be directed against it as a whole, but at the same time against each one of the States that are included in it. Therefore, this principle determines the jurisdiction according to the place where the assumed delinquent is to be found following commission of the offence, independently from the convergence, or not, of any other link. This basis for establishing competence was set down in 1985 in Article 23.4 of the Organic Law of Judicial Power (*LOPJ*).

16. In any case, it should be pointed out that this consideration of genocide as a crime against humanity is not a unanimous one. In spite of the fact that the creator of the term himself and of the concept of genocide seemed to understand it so implicitly (see R. Lemkin, "Le crime de genocide", *R.D.I.*, n. 4 (octobre-decembre 1946), pp. 213–223, specially pp. 216–220) and that this is really the most widely accepted criterion in the doctrine (see *ad.ex.* H.D. de Vabres, *loc. cit.*, p 505 or M. Pérez González, "La responsabilidad internacional de sujetos distintos de los Estados", in M. Díez de Velasco (Dir.), *Instituciones de Derecho Internacional Público*, 11th ed., Tecnos, Madrid, 1997, pp. 707–721, p. 713), there is no dearth of express negators of this concept (thus A. Miaja de la Muela, *loc. cit.*, p. 386).

former attempts to refer, literally, to offences against the international

B. Unlawful Seizure of Ships and Aircraft and Unlawfnl Action Directed against the Security of Maritime and Aerial Navigation

Chapter IV of Section I ("Offences against National Security") of tlie previous Penal Code, which only had two Articles, 138 and 139, included the "offences of piracy", in force up to May 1996. Though it must be said that penalties for these offences were specified under this heading, the conception of what should be understood as acts of piracy was not even established.[17] All of wliich had logically been criticized, just as the wording used had been. Furthermore, the same actions committed "against aircraft or similar apparatus or using such means for carrying them out" were also included with no nuances.[18] If that were not enough, these precepts also suffered from serious flaws that had given rise to widespread doctrinal reproof.[19]

All these flaws and insufficiencies of the previous regulation of the Penal Code, but above all the existence of two special laws and, therefore, of preferential application, had for some time opened the way for both provisions to be talked of as dead letters.[20] It must be said that on this last occasion, the national legislator had indeed appeared to echo doctrinal opinions expressed previously and to perceive,

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17. According to the text of the abolished Article 139, the offence of piracy committed against Spaniards or citizens of another State that was not at war with our country was sentenced to long-term imprisonment (*reclusión mayor*). In the event of an offence committed against non-belligerent citizens of another State at war with Spain, the punishment was a long prison sentence (*prisión mayor*). Likewise, the rank of "chief, captain or head pirate", as well as seizure by boarding or by fire, or if the offence were accompanied by assassination, homicide, certain types of injury, or indecent assault, and if a person were left with no means of survival, were all considered classifications in Article 139, for purposes of the penalty (which was considerably greater).

18. Article 139, last paragraph.

19. Thus on one hand, Article 138 made a distinction between piracy against Spaniards or against foreigners of a state not at war with Spain and non-belligerent citizens of another State at war with our country, with a lessening of the penalty in the latter case.

As may be seen, these distinctions, apart from being absurd, could present serious interpretation problems in cases where the ship or aircraft seized carried non-belligerent citizens and foreigners at the same time; cf. J.M. Rodríguez Devesa and A. Serrano Gómez, *Derecho Penal Español: parte especial*, 13th ed., Dykinson, Madrid, 1995, p. 672.

On the other hand, the incoherence resulting from not including deeds of piracy against belligerant citizens from a country at war with Spain, who would be atypical, had also been censured while also criticizing the vacuum existing concerning the stateless (*id.*).

20. Vid. among others, F. Muñoz Conde, *op. cit.*, pp. 593 and 594, and J.M. Rodríguez Devesa and A. Serrano Gómez, *op. cit.*, pp. 669–670.

consequently, the anachronism apparent in those two provisions. The solution finally chosen in the reforms undertaken by Organic Law 10/1995 was the straightforward annulment of both these precepts. Since the entry into force of the new Penal Code, therefore, there is no longer any provision on this matter. Thus, we should refer briefly to the rulings applicable in this respect.

In the field of aerial navigation, the Penal and Procedural Law of Aerial Navigation[21] has been applied, in which field of application acts of unlawful detention of persons are included, whereas Article 39 considers the seizure of aircraft with violence and intimidation "in circumstances of place and of time which make the protection of a State impossible". But we should point out that this law has been modified by Organic Law 1/1986, dated 6 January that annulled the aerial penal jurisdiction for offences and faults classified in the 1964 Law.[22]

In the field of maritime navigation, the 1955 Penal and Disciplinary Act of the Merchant Navy covered acts of piracy, always displacing the Code's regulation, as it was a matter of a preferential criminal law.[23] However, since this Act was repealed by the new National Harbours and Merchant Navy Act of 1992[24] the situation has become truly confused and problematic, owing to the fact that the new law lacks penal features, only providing for administrative sanctions.[25]

In view of the foregoing, until the latest reform of the Penal Code came into force in 1996, the only solution was to return to the application of those two provisions of the Penal Code, in spite of them being obsolete and incomplete. However, the situation has become even worse after the latest reform, for now not even that law is in force any longer. Therefore, it only remains for us to lament the current legislative vacuum and to draw attention to the painful absence of diligence shown by Spanish legislators who failed, right from the beginning, to pay attention to the harmonisation of national and international legislation or, at least, to update it or to make provision,

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21. Act 209/1964, of 24 December; *BOE*, 28 December 1964.

22. *BOE*, 14 January 1964.

23. Among others, this law considered as acts of piracy "depredation and violence against people at sea or from the sea by individuals of a ship's crew that has placed itself beyond the jurisdiction of any State (...)" (Article 9); "individuals of a ship's crew and persons on board that ship who provide means for persons from another ship to seize the former with violence, or to pillage or injure persons found on board" (Article 10.2), and "similar conduct committed at sea or from the sea against aircraft or similar apparatus" (Article 11).

24. Act 27/1992 dated 24 November; *BOE*, 12 December 1992.

25. There has also been criticism because the new Act does not establish any transitory provision regarding the sentences passed by the previous Act or pending cases; which, on one hand, will prevent compliance of convictions already imposed and, on the other, will mean that pending cases may be shelved. It is a matter of new problems that have been attributed to a "un lapsus del legislador, sin duda debido a la ligereza con que se elaboran las normas"; J.M. Rodríquez Devesa and A. Serrano Gómez, *op. cit.*, pp. 669–670.

in the last general modification to our legal system, for some sort of parallel regulation in this respect.

III. OFFENCES AGAINST THE INTERNATIONAL COMMUNITY CLASSIFIED IN THE 1995 PENAL CODE

A. Offences against *Ius Gentium*

As mentioned previously, the new Section XXIV of the Penal Code opens with a first chapter headed "Offences against Ius Gentium". Though the title might make one suspect extensive contents nearer, therefore, to its conception in international laws, the impression is erroneous, for provision is made therein only for certain offences committed against a "foreign Head of State" or against a "person internationally protected by a Treaty, who is in Spain".[26]

In this way, all the protection conceded to foreign representatives mentioned is condensed in two precepts, Articles 605 and 606, in line with the experience of foreign Comparative Law, which frequently also resorts to including the two categories of persons in one single criminal class as the victim of an offence. Foreign Heads of State and other internationally protected persons thus indistinctly become the material object of the conduct stipulated, and no distinctions are made either in the *quantum* of the penalty to be imposed depending on the offence committed against persons of one or another condition. In any case, this classification of an offence with inherent foreign and visible international elements or effects, is doubtless the most acknowledged and extended in National penal systems.[27]

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26. Prior to the latest reform, the Chapter with the same heading "Offences against *Ius Gentium*", included attacks on internationally protected persons (previous Articles 136 and 137), as well as the genocide offence (previous Article 137 bis). An important group of experts had already centred its attention on the evident lack of adaptation between the designation of the chapter and the contents before entry into force of Organic Law 10/1995. These criticisms still persist with more reason if possible, for half of the chapter has been emptied of its contents and the legislator still insists on that previous imbalance, vid., underlining that lack of correspondence and proposing the wording for this chapter "Offences against Internationally Protected Persons", the commentary of J.L. Rodríguez-Villasante y Prieto, "Delitos contra ..." in *Seguridad Nacional-Seguridad Internacional, loc. cit.*, p. 57.

27. For corroboration and for a review of the more outstanding legal antecedents in our own legal system and in comparative legislation, see A. Quintano Ripollés, "Atentados contra la soberanía estatal extranjera y sus órganos", *Tratado de Derecho Penal Internacional e Internacional Penal, Tomo I*, Consejo Superior de Investigaciones Científicas/Instituto Francisco de Vitoria, Madrid, 1955, pp. 283–296.

The Spanish regulation had been partially modified in 1983, despite the fact that our country was to take two more years to ratify the 1973 New York Convention.[28] The precepts in force actually correspond to that pre-agreement renewal and there has been no substantive alteration after the latest reform.

1. The Conception of Internationally Protected Person

The "internationally protected person" conception of law-making is an open one. The New York Convention offers further details in this respect in Article 1. This precept, apart from establishing the characteristic of internationally protected person pertaining to Heads of State, Heads of Government and Ministers of Foreign Affairs in a foreign State, as well as accompanying members of their family, includes representatives, civil servants, officials or agents of States or intergovernmental organizations who at the time and place in which an offence is committed against him, his official quarters, private residence or means of transport, has the right, in accordance with International Law, to special protection, in the same way as his family. On one hand, the New York Convention does no more therefore, than reflect Customary International Law where it concerns Heads of State and of Government and Foreign Ministers and, on the other, refer back to and abide by the protection provided by International Law, either customary or conventional, with respect to other kinds of persons.

The relatively open characteristic of the international provision in Article 1 of the New York Convention and also the fact that it is designed to be developed at the same pace as International Law, referring at all times to the solutions provided therein, has been correctly interpreted in Spanish domestic laws. However, the latter have reduced international laws to be taken into account, to the merely conventional. But this does not appear to imply any problem: according to our legal system, an internationally protected person is one considered as such by a treaty.

However, this consideration of the victim – in the domestic legal system – has not been equally well received by all experts in criminal law. In fact, according to some, the International Agreement neither obliged a State to provide extra protection to all persons listed in its definition in Article 1, nor was it suitable that a general clause be used in our Penal Code. In short, according to that, the Spanish legislator should have defined the circumstances in which this protection became necessary.[29] We cannot agree with this view and we think that recent experience supports our discrepancy. In truth, in our opinion, neither the international provision, nor the domestic Spanish one

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28. *Vid. BOE*, 7 February 1986.

29. *cf.* T.S. Vives, in T.S. Vives, J. Boix Reig, E. Orts Berenger, J.C. Carbonell Mateu and J.L. González Cussac, *Derecho Penal. Parte Especial*, Tirant lo Blanch, Valencia, 1993, p. 43.

suffers from excessive length.[30] The possible contents of both are delimited by the evolution of International Law itself (by conventional law specifically, in the case of the second regulation of a domestic kind). And it has been this flexibility of the conception of law-making that has enabled a perfect adjustment of new categories of persons protected internationally by a new treaty in the Spanish legal classification, without having to resort to another reform. We refer to persons who come within the field of application of the Convention on the Safety of United Nations and Associated Personnel, adopted by the General Asembly in Resolution 49/59 dated 9 December 1994.[31] There are multiple reasons that support the convenience and even the urgency for offences specifically aimed against this type of persons to be concretely provided for in domestic legal systems.[32] Some of these motives are strongly interlinked: the bloodcurdling series of open internal armed conflicts we are currently witnessing; the continual appearance of new sources of internal tension and disturbances; the now frequent and, until a short time ago – almost unheard of – deployment of peacemaking activities of different kinds (preventive diplomacy, humanitarian and peacekeeping operations); growing national participation in all this, as well as the likewise progressive number of States who have become prepared to intervene; the unfortunate multiplication of attacks against persons who take part in these missions; the exceptional seriousness of the consequences of such attacks, not only for the material victims, but for the international community as a whole... In a word, it is worth pointing out that the ILC itself has been nnable to get out from an individualized consideration and has decided to include these offences as autonomous crimes

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30. In this sense, one may see the criticism of Vives by Rodríguez-Villasante, in *loc. cit.*, pp. 59 and 60.

31. Rodriguez-Villasante had already recently pointed out this possiblity when he expressly referred to this considerable extension of the definition of victim of the offence, insinuating and, doubtless guessing, that the latter had been "unsuspected for the Spanish legislator", *loc. cit.* p. 57 and also particularly pp. 60–3.

32. Article 1 of the Convention establishes the definitions of persons protected who come within the filed of application *ratione personae*. Thus, for purposes of the treaty text:

a) "United Nations personnel" is taken to mean: i) persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation; ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Organization (IAEO) who are present in an official capacity in the area where a UN operation is being conducted.

b) "Associated personnel" means: i) persons assigned by a Government or by an intergovernmental organization with the agreement of the competent organ of the United Nations; ii) persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency; iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary General of the United Nations or with a specialized agency or with the International Atomic Agency.

("crimes against UN and associated personnel" in its Draft Code of Crimes against the Peace and Security of Mankind[33]). Though it may perhaps be wise to add that in accordance with this Draft Code, an international crime like this may only be committed when an ulterior subjective element coincides, i.e., if the purpose of "preventing or hindering compliance of the mandate" in the course of the operation exists. This requirement, however, is not included in the 1994 Agreement, which is content with protecting the participants and not the operation itself.[34]

2. *Classified Offences and Not Specifically Classified Offences*

The only offences that are expressly classified are attacks on the life[35], injury[36] and the violation of personal immunity of internationally protected persons.[37]

With respect to this last offence, determination of the legal protection granted by the domestic laws of Spain depends, once again, on the contents of the immunities provided in International Law. A logical reference expressly made in the Organic Law on Judicial Power (*LOPJ*) when, referring to the scope and limits of jurisdiction in Spanish courts in general, it excludes, in the second paragraph of Article 21 "the cases of immunity from jurisdiction and execution established by the provisions of Public International Law". In any case, its consideration as an offence in our domestic legal system restricts its scope to immunities that are simply personal. Therefore, one will have to refer to International Customary and Conventional Law in order to verify the

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33. *Vid.* Article 19 of the Draft in *Report of the ILC on the work of its forty-eighth session... cit.*, Article 19 and Commentary. The ILC expresses itself strongly in its commentary on this provision. Specifically, for our purposes the following is significant: "(...) attacks against such personnel are in effect directed against the international community established for the purpose of maintaining international peace and security by means of collective security measures taken to prevent and remove threats to the peace. The international community has a special responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal attacks against United Nations and associated personnel which often occur in situations in which the national law-enforcement or criminal justice system is not fully functional or capable of responding to the crimes. ... In terms of the broader negative implications of such attacks, there may be an increasing hesitancy or unwillingness on the part of individuals to participate in United Nations operations and on the part of Member States to make qualified personnel available to the Organization for such operations"; *id.* Commentary on Article 19.

34. *Vid.* paragraph 1 of Article 19 and the ILC's commentary on the subject, in *loc. cit.*

35. Article 605 first paragraph, where the punishment involves 20–25 years imprisonment and, if two or more aggravating circumstances coincide, 25–30 years.

36. *Id.*, second paragraph, with a prison sentence of 15–20 years if the injury were one of those defined in Article 149 (*i.e.*, which might cause "the loss or unserviceableness of an organ or main member, of one of the senses, or impotence, sterility, grave deformity or grave somatic or psychic illness", and of 4 to 8 years in the case of any other injury.

37. Article 605, first paragraph, imposing 6 months to 3 years imprisonment.

extension of personal immunity enjoyed by each type of internationally protected person and be able to punish its violation in accordance with the domestic legal system.[38]

It must be pointed out, in any case, that with all probability, unlike what happens with regard to attacks on life and physical integrity (established respectively, in paragraphs one and two of Article 605), violation of the personal immunity of a foreign Head of State or of any other person internationally protected by treaty (classified in paragraph one of Article 606) may only be committed by a person who is an authority or civil servant. As it is not a question of an action that claims to be legal, we could find ourselves, for example, with an offence of unlawful detention.[39]

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38. Thus the principle of inviolability must be applied to the person of the diplomatic agent who may never be the object of any measure of detention or arrest and who enjoys absolute immunity from jurisdiction in the receiver State (*Vid.* Articles 29 and 31 of the Vienna Convention on Diplomatic Relations, dated 18 April 1961; *BOE*, 24 January 1968).

Consular officers may not be arrested or remanded in custody except when it concerns a serious offence and only by decision of the appropriate legal authority. And, excepting the latter, they may only be arrested or subjected to some other manner of limitation of their personal freedom by virtue of a firm sentence. Furthermore, civil servants and consular officers have immunity with respect to the intervention of the legal and administrative authoriteies of the receiver State for acts carried out in the performance of their duties (*cf.* Article 41, par. 1 and 2, and Article 43, par. 1 of the Vienna Convention on Consular Relations, dated 24 April 1963; *BOE*, 6 March 1970).

As for the immunity of members of special missions, they are defined in Articles 29 and 31 (for representatives of States and diplomatic staff with similar recognition to that established in the 1961 Convention) and in Articles 36, 37 and 39 (for administrative and technical staff, service employees and persons who are part of mission members' families, respectively) of the Convention of 8 December 1969.

Inmmunity guaranteed to members of permanent missions to International Organizations is included in the Vienna Convention on the Representation of States in the Relations with International Organizations of a Universal Character, concluded on 14 March 1975 (Articles 28, 30 and 36), as well as in the various existing bilateral treaties on these matters.

For its part, the Convention on the Safety of UN and Associated Personnel obliges receiver States in Article 4 to sign agreements with the UN as soon as possible, concerning the statute of operations to be carried out and the staff who participates in them. Agreeements that must include "provisions for the prerogatives and immunity of members of the military and of the police in the operation".

39. Just as J.M. Tamarit Sumalla maintains very sensibly, when he points out that "a pesar que el sujeto activo aparece contemplado de modo indiferenciado conforme a la fórmula usual 'el que', cabe entender que tan sólo podrán ser autores del delito los funcionarios, puesto que la violación de la inmunidad supone una acción del Estado receptor contra el Estado representado por la persona internacionalmente protegida (...). En lo que respecta a la detención, no se produce concurso de delitos con el tipo de detención ilegal practicado por autoridad o funcionario, ya que el art. 530 se refiere a las garantías 'constitucionales y legales', entre las que no se encuentra la inviolabilidad diplomática, reconocida a través de normas de Derecho internacional público"; "Delitos contra la Comunidad international", in *Comentarios a la Parte Especial del Derecho Penal*, G. Quintero Olivares (Dir.) and J.M. Valle Muñiz (Coord.), Aranzadi Editorial, Pamplona, 1996, pp. 1633 and following, p. 1637.

However, paragraph three of Article 605 leaves the door open for punishment of other offences:

> "Any other offence committed against the persons mentioned in the preceding numbers, or against official premises, private accommodation or means of transport of those persons, will be punished with the sentences established in this Code for the respective offences, of the more severe degree".

A criticism of the wording of this provision is unavoidable, insofar as it leaves the offences of unlawful detention or kidnapping out of the explicit rule, with the effects that would supposedly result therefrom with regard to the punishment to be imposed. We think that they could at least have been mentioned, together with injuries, for two reasons.

In the first place, an explicit reference would be appropriate, for the New York Convention itself, the compulsory source of legal inspiration for the numerous member States, does so when it explicitly mentions kidnapping and other attacks against the freedom of an internationally protected person in Article 2, among classified conduct. And though the Convention does not call ex novo for an independent classification of all attacks against persons who enjoy international protection with the imposition of a higher penalty, but only for establishing penalties appropriate to their gravity, the fact that it establishes some conducts with intent openly and others not and, even, the fact that the former are punished more severely that the latter, introduces a somewhat absurd discriminatory factor; especially insofar as such a choice by the legislator was being at least partially denied by statistics. In this way, the second reason we want to mention would continue the discussion along these lines in further detail and, as mentioned previously, it is also supported by practical reality.

Indeed, in second place, the opportunity for an explicit classification here would stem from the fact that this category of offences against freedom is among those that are most frequently aimed against this type of person.[40] For these reasons, we are

40. It would be impossible to give here even an approximate number of the attacks upon the freedom of internationally protected persons. Merely as an indication, one may see the many cases during the 70s up until the middle of the 80s mentioned in C.E. Baumann, *Diplomatic Kidnappings*, Martinus Nijhoff Publishers, Dordrecht, 1973, *id.*, "Diplomatic Kidnappings", in B.M. Jenkins (Ed.), *Terrorism and Personal Protection*, Butterworth Publishers, USA, 1985, 23–45; or in F. Przetackik, *Protection of Officials of Foreign States according to International Law*, Martinus Nijhoff Publishers, The Hague, 1983.

surprised that their absence has not been missed in the doctrine[41], because this was also the wording used in the lately abolished regulation.[42] In fact, the only appreciable variation that appears in the laws in force in comparison with the previous ones, is the one centered on the change of place of these provisions.

3. *The Intentionality Requirement*

Commission of this type of offence must always be intentional. That is to say, the author/s must be aware that the victim is a Head of State or an internationally protected person and make him the target of his attack by virtue of that condition. This requirement is formally reflected through certain characteristic clauses in international treaty texts on the subject. For example, Article 2.1 of the New York Convention requires that, in order to make the definition as an offence obligatory in the legislation of participant States, the action "be committed intentionally". Likewise, Article 9 of the Convention on the Safety of UN and Associated Personnel requires "intentional commission" of the acts in question. Article 19 of the Draft Code of Offences against the Peace and Security of Mankind also establishes that crimes against UN and associated personnel be committed "intentionally".[43]

However, Spanish criminal law stipulates nothing in respect of the necessary awareness of the rank of the victim by the author of the offence. But in spite of this formal absence, there is nothing to prevent one from considering that this subjective element of the offence is included in the penal classifications established in Articles 605 and 606 of the Penal Code and that its concurrence is indispensable in order to prove that the offences classified therein have been committed. In fact, practically all

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41. As a result, we consider that the nuance Rodríguez Devesa and Serrano Gómez added to their commentary on paragraph three of the foregoing Article 137 is at least incomplete and not at all realistic, when they state that the expression "offence committed against persons" should be interpreted to the exclusion of the offences of parricide , murder, homicide and injury; in particular, when they specify, without even alluding to the offences of unlawful detention, kidnapping or terrorism, that "restan muy pocas figuras que, por si fuera poco, son de dudosa aplicación: auxilio o inducción al suicidio, infanticidio o aborto, por supuesto sin consentimiento de la embarazada, si la persona es de sexo femenino"; *op .cit.*, p. 655.

42. However, we should point to J.M. Tamarit Sumalla's surprise, shared by us, who in turn underlines the "ausencia de una referencia expresa a los atentados contra la libertad, a los que alude el art. 2.1,a) del citado Convenio (...), con una mención explícita al secuestro". Likewise, in the writer's opinion, this omission does not entail the slightest obstacle for considering that among the offences contemplated in paragraph three of Article 605, offences against freedom may be included; *cf.* "Offences against...", *Comentarios..., op.cit.*, p. 1635.

43. Vid. also, the commentary on the subject by ILC, *Supplement No. 10 (A/51/10)..., loc. cit.*, Article 19.

experts in Spanish penal law have given special attention to this subjective element included in the classification and, directly or indirectly, have underlined its indispensable presence.[44]

4. *Reciprocity of Penalty Imposed*

Before the first reform mentioned, undertaken during the 80s, there was already a condition of reciprocity which has survived the last two amendments. In fact, according to paragraph two of Article 606, if the offences included in the two precepts on protection do not have a reciprocal penalty in the legislation of the accrediting country of the offending persons, the author will be punished with the penalty that our Penal Code imposes upon such offence, regardless of the official character of the victim. The requirement of penal homogeneity between the legislation of both States has led to the widespread idea that concludes, we think wisely, that what really is supposed to be protected, if only indirectly is the Head of the Spanish State and the Spanish representatives accredited in foreign States.[45] As a matter of fact, this condition is practically always repeated in treaties in matters concerning extradition which can, therefore, thwart the handing over of a presumed author of one of these offences.

B. Crimes of Genocide

Chapter II of Section XXIV comprises a single provision concerning the classification of the most tragic current international offence and the one that has attracted the greatest attention on the part of various media and public opinion around the world in latter years. In fact, the horrifying noun *genocide* is used frequently as an adjective to qualify any attempt at a description of armed conflicts or armed repression in the present or recent past – avoiding all comment on the continual politicization or manipulation of those situations, as well as their causes: Cambodia, the former Yugoslavia, Rwanda, Burundi, Sudan, Liberia, the case of the Kurds, etc.

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44. A. Quintano Ripollés, referring to previous penal classifications, already stressed "el plus específico de conocer la cualidad oficial del sujeto pasivo, sin lo cual tal delito no tiene razón alguna de ser"; *op. cit.*, p. 286. Also in the words of J.M. Rodríguez Devesa and A. Serrano Gómez, "el dolo debe abarcar la condición de Jefe de Estado o persona internacionalmente protegida de la víctima"; op. cit., p. 654. In the same context, for E. Muñoz Conde, "sólo es posible la comisión dolosa, que debe abarcar la condición (...) de la víctima. En caso de comisión imprudente de estos hechos serán aplicables los artículos 142 y 152"; *Derecho Penal...*, Ed. 1996, *op. cit.*, p. 654. Along the same lines, one may refer to J.L. Rodríguez-Villasante Prieto's commentary, *loc. cit.*, p. 60.

45. *cf.* F. Muñoz Conde, *op .cit.*, p. 653.

Genocide is obviously not new to the Spanish Penal Code. Its classification dates from the reform of 1971 and since then, it has undergone several revisions that have not differed too widely from the original provisions.[46] Though it is true that the essential core of penal classification has hardly varied with the latest reform, there have indeed been certain inflexions and, above all, an appreciable extension of the concepts that exist around the central offence or offences. In reality, as far as the typical categories are concerned, and though it is true that the previous structure has been maintained in what is fundamental, it has been partly improved through a redistribution of the different punishable acts with an improved arrangement, and partly extended so that it covers some new angles. For this reason, we do not intend to give a general view of the offence, nor to retrace our steps on the more controversial problems triggered by genocide. Spanish penal experts have already discussed these matters meticulously and exhaustively. Therefore, we will only try to examine what may be new after the latest reform of the Penal Code, confirm its degree of adaptation to international policy on this offence and account for some of the practical effects resulting from insufficient interrelations between the international and national dimensions in the regulation of this offence.

It is advisable to underline beforehand that the majority of the disadvantages or obstacles detected in the Spanish legal system and in most domestic systems concerning this matter are of a practical kind (really, lack of action) and then, particularly, jurisdictional. Problems that become the mediate consequence of the simple individual rapprochement ventured by the States when they prepared the Convention of 1948[47] and, more immediately, of the timid and insufficient measures that were introduced at the same time concerning legal competence.[48] Furthermore we should also point out that, unlike war crimes, the 1995 Penal Code states with regard to genocide that offences that are part of this classification (Article 131.4) are not subject to negative prescription, nor are the corresponding penalties (Article 133.2). It

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46. Our country thus adapted its domestic legislation to the Convention for the Prevention and Punishment of the Crime of Genocide that it had just signed; *vid. BOE*, 8 February 1969.

47. A criticism of this conventional approach may be found in various studies; *e.g.* see G.A. Finch, "The Genocide Convention", *AJIL*, Vol. 43 (1949-4), 732–738, pp. 733–734; J.L. Kunz, "The UN Convention on Genocide", *AJIL*, Vol. 43, (1949-4), 737–746, p. 745.

This treatment of the offence from a merely private and individual perspective was not able to avoid, what is more, the intervention of one of the famous reservations that gave rise to the ICJ's Report. Precisely, the matter concerning the reservation tabled by the Philippines on the intended penal immunity of the President of the Republic, may be seen in M. Díez de Velasco Vallejo's commentary in "El sexto dictamen del TIJ: Las reservas a la Convención sobre el genocidio", *REDI*, vol. IV (1951-2), 1029–1089, pp. 1049–1052.

48. Establishing only the principle of territorial jurisdiction, at the same time as referring the affair to the international court whose jurisdiction would have been accepted by the parties, whose establishment is still being awaited since that time (cf. article 6 of the Convention).

concerns a regulatory option likely to gain the utmost practical importance, fundamentally bearing in mind that the authors of this type of offence generally flee to the territory of another State. The existence of negative prescription in these situations could well make the detention and corresponding legal prosecution of the presumed author of the offence impossible, as generally more time is required for his localisation, criminal investigation and other eventual measures.

1. Possible Categories of Genocide

The distinction between three overall types of genocide is already well-established: physical, biological and cultural. Spanish penal experts consider that only the first two are included in the existing Article 607, similar to what they thought to be the case with previous Spanish provisions and with the international Convention itself. In fact, it is not difficult to see how the act of killing (section 1 of paragraph one), of inflicting injuries (Sections 2, 3, and 5) and of subjecting the group or any of its members to conditions of existence that endanger life or seriously affect health (Section 3) are necessarily included in the category of physical genocide; in the same way that carrying out the forcible removal of a group or of its members, displacing by force individuals of one group to another or adopting any measure intended to prevent their way of life or reproduction must be included in a penal classification of biological genocide.[49]

We should point out, however, that for some authors cultural genocide could be part of the conduct classified in section 4 of paragraph one of the same Article 607.[50] Different kinds of acts are covered there: on one hand, forcible removal of a group or of its members or displacement by force of individuals and, on the other, any measure that tends to prevent their way of life. When trying to make an approach to that line of argument and when it comes to the point of looking for an eventual regulatory criterion for cultural genocide, it might be advisable to say that perhaps action specifically aimed at destroying the language, religion or the culture of a group might best be included in that second group rather than in the first. That is, measures designed to prevent the way of life of a group would always be more likely to have greater probabilities of being included in acts of cultural genocide than conduct that

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49. It must be put on record that the 1948 Convention, as well as our Code, similar to other texts such as the latest work by the ILC, unlike the London Convention of 1948, conceives the classification of genocide exhaustively.

50. In this context, see J.L. Rodríguez-Villasante Prieto, "Delitos ...", *Seguridad Nacional-Seguridad Internacional ..., loc. cit.*, pp. 67–68.

consists of removals or displacements imposed by coercion.[51] But even taking into account that on an immaterial level the essentially open and indefinite character of the typical act of preventing the way of life of a group would surely enable manifestations or acts of real cultural genocide to be included, everything seems to indicate that legal reality is something quite different. At least that is the intention that seems to be in the domestic and international legislator's mind. Obviously, if during the preparatory work of the 1948 Convention and of other treaty drafts, the categorical intention of not including the phenomenon called cultural genocide among these acts aimed at the annihilation or partial destruction of a group by physical or biological[52] means was, and still is, being made clear, in the same way as there is no proof that there was any intention of including cultural genocide during the periods when the last reform and preceding laws – where a formula similar to the one in force at present existed – were being discussed in the Spanish parliament.

In any case, even in the hypothetical case of the opposite having been approved in

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51. Even so, this is the place where other experts in this matter also see, in certain acts of displacement, a clear example of cultural genocide. This, for example, is the case of S. Glaser, who in view of Article 2, section 6 of the 1948 Convention (displacement by force of the children of one group to another group), declares that "(...) Abstraction faite de ce que le choix du cas susmentionne d'un genocide culturel (transfert forcé d'enfants ...) est fort arbitraire -en effet on ne voit pas une difference substantielle entre ce cas et, par exemple, le fait d'empêcher la naissance para stérilisation ou avortement – le génocide culturel devrait être admis dans son ensemble"; *Droit international penal...., op. cit.*, pp. 110–111.

52. During the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide carried out by the Sixth Commission, several delegations proposed the incorporation of the cultural genocide category just as, in fact, it had been established in an initial treaty draft. Among others, Egypt, Pakistan and Venezuela were in favour. The United States of America and France were roundly against; *cf. Document Seventeen (a), Sixth Committee. Legal Questions, Official Records of the Second Part. First Session of the General Assembly*, Summary Record of Meetings 2 November-13 December 1946. As for the decision of not including cultural genocide in the draft Code of Offences against the Peace and Security of Mankind, refer to the explanation given by the ILC in its *Report of the ILC on the work of its forty-eighth session... cit.*,Article 17 and Commentary.

That exclusion of a category of cultural genocide from the 1948 Convention already at that time gave rise to comments from the experts. It would certainly be interesting to look trough some of those texts, keeping in mind the events in various points of the planet, including our continent, that once again shocked the world. As one more than graphic example, leaving cultural genocide out was a largely justified option, according to Miaja de la Muela, owing to the enormous distance existing between action aimed at destroying cultural demonstrations and genocide strictly speaking. Whereas the latter always contitutes a common offence, so called cultural genocide has a marked political character. On the other hand, what is more, if for the former it would also be impossible to find absolving or extenuating circumstances, a supposed prevention of separatisms could still be invoqued for the latter; cf. A. Miaja de la Muela, "El genocidio, delito internacional", *REDI*, vol. IV (1951-2), 363–408, p. 378. Understandably, it is a question of opinion. Perhaps we should not forget either that the problems being discussed in this context have to do with the most intimate customs and traditions related to the different or multiple forms of human life.

the 1948 Convention or in any other treaty instrument and, consequently, in domestic legal systems also, we fail to see how a domestic provision like that could have been applied. The reason for being specially skeptical in this has nothing to do with the lack of practical cases, rather with thinking that if acts of physical and biological genocide are organized and are perpetrated, nearly by definition, from the government structure of the State, the main manifestations of cultural genocide, such as a prohibition of printing or publishing texts in a group's language and of using that language in schools or the destruction of libraries, museums, schools, places of worship or historical monuments, could hardly be carried out by others than by the state apparatus itself. Reference to the saddest of historical examples may be more eloquent than many words: Tibet. Without entering into the fundamental reason for the annexation, we can refer to simple examples of a policy of cultural assimilation followed by the Chinese from the moment of occupation in 1950, plunder of thousands of monasteries, persecution of monks and lamas, destruction of dwellings or the imposition of a Chinese architectural style, which have gravely endangered survival of the civilization of a whole people.

2. *The Question of the Victim in a Genocide Offence: Absence of Political Groups*

In order to commit the offence of genocide, apart from materially carrying out any of the acts laid down in Article 607, the intention of total or partial destruction of a national, ethnical, racial or religious group must concur. This is the imperative subjective element imposed by domestic laws, which in this point, does no more than respect the literal implication of the 1948 International Convention. Thus, the approval of the new Penal Code has put an end to an old error that had slipped in on publication of the previous reform reducing the protected human groups from four to three, when the comma that should have gone between "national" and "ethnic" was suppressed. When this punctuation mark was replaced, the number of protected groups was restored to four again, as in the International Convention.

But, on the other hand, it is true to say that *political groups*[53] are neither found in groups established by the Convention, nor in those provided for in the domestic legal

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53. It is true that when the 1948 International Convention was being drafted, the United States, United Kingdom and The Netherlands tried to include them rather insistently what is more. This came up against the express objection of countries like the ex-USSR, Poland, Egypt, Iran, Peru, Brazil and Uruguay who blocked that move.

Various criteria were mentioned in order to oppose their inclusion. It ended in the foreseeable argument of the impossibility of intervening in the internal affairs of States and, fundamentally, in the presumed subjective and provisional character of these groups. We find the latter reasoning erroneous or only partially valid, insofar as religious groups have indeed been included, however, as capable of becoming

system. In any case, this is not the place to discuss the past and to question what would have been better, to include or not to include political groups when the International Convention was being drawn up. The truth is that our Penal Code does no more than be faithful to the Convention on this point, and does not consider, therefore, that political groups can be possible victims of the offence.

Consequently, in those cases where, in spite of any of the characteristic acts of genocide having been committed and the concurrence, furthermore, of the intention of total or partial destruction of a group, the only common feature that unites all the members of this group is their political affiliation, one may speak of a crime against mankind (of extermination, persecution for political reasons or any other inhuman act that seriously impairs the physical or mental integrity of human beings), for purposes of International Law, as well as of the domestic Spanish legal system, but not of an offence of genocide.[54]

3. *Sexual Assault: Possible Case of Genocide?*

As mentioned above, the latest reform of the Penal Code included a certain extension of the crime of genocide, so that some new elements are understood to have been included. In this respect, we must point to the incorporation of sexual assault in

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victims of the offence. A. Miaja de la Muela also appears to show his disapproval of the non-inclusion when he says that "desgraciadamente para sus miembros, los partidos políticos en peligro de exterminio físico por el gobernante de signo opuesto, han tenido, antes de llegar a este trance, una actuación que difícilmente pueden ocultar los que participaron en ella, y de la que queda constancia en ficheros, manifiestos, prensa, seguramente mejor definitoria de la filiación al partido perseguido que los que puedan ser los caracteres somáticos que acrediten la pertenencia, en caso de persecución de tipo racial, al grupo étnico en desgracia"; *loc. cit.* pp. 377–378.

54. It could be thought that in general other links tend to exist, in situations of this kind, apart from political affiliation. Thus for example, in the recent cases of genocide in Rwanda and Burundi, the systematic elimination of internal political opposition was at the same time related to a particular sector of the population, to be precise, to a minority ethnic group.

Nevertheless, it is also worth noting how political ideology, in certain cases, constituted the real link in a group, whose members have been persecuted and many of them eliminated for belonging to it. If we come to the cases of compulsory disappearances of Spaniards in Latin America, the existence of the required intention would still have to be proved, *i.e.* of the total or partial destruction of the group. But even if that were the case, the principle of legality would turn the atypicalness of the political group as a possible victim of the offence into the cause of the certain non-application of the penal classification of genocide. However, the fact that the offences referred to cannot be included in that penal category –international and domestic– in no way diminishes their seriousness. That impossibility is due we think, only to insufficient adaptation, already mentioned, of the Spanish legal system to International Law, according to which those execrable deeds constitute, with not the slightest doubt, authentic crimes against humanity.

section 2 of paragraph one of Article 607, as a result of recent and cruel memories of the war in the former Yugoslavia, while the Spanish reform was being discussed in the Spanish parliament. However, in spite of the merit that must be acknowledged for the consciousness of what recourse to sexual violence signifies as a means or method of combat and its consequent treatment, we do not think that the specific incorporation of this type of aggression in the classification of genocide is appropriate.

To our way of thinking, there is a combination of formal and material reasons for considering it an error. Firstly, we should mention the clear separation between the domestic legal system and the 1948 Convention, which says nothing on this point. But fundamentally, in second place, we should perhaps refer to the unsuitability of sexual assault as a means for achieving the total or partial destruction of a national, racial, ethnic or religious group. Subjective element of the offence, specific intention or *mens rea* that must always concur, to the point of providing, if desired, the unavoidable 50% of the crime of genocide established in International Law, which would be missing in the classification under discussion.[55] And thirdly, we could even ask ourselves about the possibility, obviously unsatisfactory, of including the effects of a sexual assault among the injuries foreseen – all the possible ones – after going over sections 2, 3 and 5 of paragraph one of this Article 607 of the Penal Code.

For all these reasons it would seem, in our view, that bringing sexual attacks into this context is inappropriate, although this does not mean to say that we disapprove of the concern shown; indeed, we propose that the best place for including this conception would be Chapter III concerning offences against protected persons and property in the event of armed conflict.[56] Likewise, hypothetically, another suitable place for including sexual violence committed systematically or against multiple victims would be a still non-existent chapter in our Penal Code, but proposed herein[57], aimed at the regulation of crimes against humanity. This could also cover those cases even in the absence of a real armed conflict.[58]

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55. Where, as Tamarit Sumalla has stated most reasonably, it would only be possible to speak of, depending on the case, "the coercive imposition of crossbreeding", *cf. op.cit.*, p. 15.

56. Tamarit Sumalla has a similar opinion, *id.* p. 15.

57. See section II.A above.

58. Which would be similar to what is being done in the Statutes of the International Tribunals for the former Yugoslavia (Article 5) and Rwanda (Article 3) and the ILC in its Draft Code. Thus, section j) of Article 18, that actually has the title "Crimes against Humanity", explicitly includes "rape, enforced prostitution and other forms of sexual abuse"; *Report of the ILC on the work of its forty-eighth session... cit.*, Article 18 and Commentary.

4. *Association and Direct and Public Instigation to Genocide in International Treaties as the Propagation of Certain Ideas or Doctrines in the Domestic Penal System*

The new Spanish Penal Code extends the classification of genocide with respect to the previous rules (which required that the conduct foreseen might be a direct incitement to the commission of an offence). This is evident if we take the 1948 Convention as a point of reference (which provides punishment for association, as well as for "direct and public instigation to commit genocide"). In this way, paragraph two of Article 607 provides for punishment by imprisonment of one to two years for "the diffusion by any means of ideas or doctrines that deny or justify" offences classified as genocide in the Code itself "or seek the rehabilitation of regimes or institutions that harbour methods that generate them".

The annulment of the final clause that appeared in the preceding Law, which had been introduced a very short time before approval of the new Code by Organic Law 4/1995 dated 11 May of that year, and which required that the statement of those ideas or doctrines could constitute a direct incitement to commit genocide, has led Spanish penal experts who have studied this subject to ask themselves what type of definition has been included in Article 607. Because the surprise and initial confusion generated by the drastic reduction of the old article 137 bis b), on eliminating that essential note, is even greater when we examine the contents of two other definitions, one general and the other specific: those included in Article 18.1 and in Article 615 respectively. The former imposes a requirement for such defense to be considered, that it consists of a form of provocation and that by nature and circumstances, it be a direct incitement to commit an offence. The latter definition mentioned specifically classifies provocation, conspiracy and proposition for perpetration of the offence covered in Section XXIV.

We might conclude provisionally, therefore, that as such defense must always constitute a form of provocation (Article 18.1) and given also, that conspiracy and proposition are also classified as preparatory action to genocide (Article 615), the definition in Article 607.2 cannot be anything but autonomous, different from defense as a form of provocation. It would perhaps be so if the serious reproof of unconstitutionality did not exist which could always be considered, for we are confronted with an *offence of opinion*[59] or in other words, an offence of "vindication of the ideology" of genocide[60] and not an offence of vindication of genocide. In short, for this reason we think that there is no other solution but to consider this definition in

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59. Tamarit Sumalla's expression, in *op. cit.*, p. 16.

60. J.L. Rodriguez-Villasante Prieto, "Delitos contra ..." in *Seguridad Nacional-Seguridad Internacional ..., loc. cit.*, p. 70.

Article 607.2 always in respect of the one in Article 18.1 of the Penal Code, that is to say, *as a vindication of the offence of genocide*[61], and demand therefore, that it constitute a form of provocation to the offence. Only thus could the constitutionality of the text be defended, though regulatory examples and case law might be found in comparative law which, led by a plausible purpose of condemning racist, xenophobic conduct and also a simple vindication of a doctrine of genocide, have reached a different solution.

In any case, the main problem regarding the location of these satellite definitions of the offences of genocide is twofold. On one hand, we have already seen that its very classification sometimes raises a sensitive difficulty, not easy to overcome, that of the fundamental right to freedom of expression. And from that perspective, the difficulty lies in the fact that it is not always easy to draw a dividing line between mere ideological discrepancy and a real incitement to genocide.

On the other hand, there is another great obstacle for which the solution is, if possible, more complicated as it greatly surpasses the purely legal field. In our view it is connected with the extreme difficulty that may exist in reaching an objective decision as to when an offence of genocide has been or is being perpetrated. It is true that regarding some events one may speak of unanimity in qualifying genocide (Nazi crimes, extermination of Cambodians, etc. – except of course, the Nazis themselves, as well as the Khmer Rouge and other authors), but it is also true that there have been other cases where it is difficult to be precise as to the concurrence of the elements required for the commission of an offence of genocide or/and where there will always be the influence of subjective factors such as ideology or the very own interests of the person who is dealing with the question.[63]

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61. What is more, this is the generally followed option, either implicitly or explicitly, in Spanish law. In this context one may refer to the suggestive forms of argument by F. Muñoz Conde, *Derecho penal ...*, 1996, *op .cit.*, pp. 657–658; Rodriguez-Villasante, *loc. cit.*, pp. 68–71 and J.M. Tamarit Sumalla, *op.cit.*, pp. 15–1642.

62. In this respect, Tamarit Sumalla indicates yet another problem of great practical interest: the degree of awareness required of the author of the deed regarding the fact that the regime, whose rehabilitation he is advocating, organize or protect that type of act, thinking fundamentally of adolescents who are not very conscious of these matters, who are recruited by organizations of a neo-Nazi type. A question which, as the writer says, may only be taken into consideration by the judge "más que en el momento de proceder a la individualización de la pena, dentro del margen de arbitrio que le ofrece la norma, más bien escaso atendiendo a la peculiaridad de este delito"; *op. cit.*, pp. 1641–1642.

63. The words of Muñoz Conde appear convincing in this respect: "is the napalm bombing of Vietnamese villages by the American air force during the Vietnam war genocide? Is the systematic bombing of Palestinian refugee camps by Israeli aviation genocide? Does it mean that a communist may be accused of genocide for defending a communist theory of society or state, justifying the assassinations, the 'gulags' and the policy of extermination of some ethnic groups perpetrated by Stalin in Russia in mid-20thc. can be classified as genocide?": *Derecho Penal...*, 1996, op. cit., pp. 657–658.

C. Offences against Protected Persons and Property in the Event of Armed Conflict

1. General Points of Law

As a signatory State of the treaty texts on International Humanitarian Law applicable to armed conflicts, the Kingdom of Spain is under the obligation to "respect and command respect of", under all circumstances, the rules contained in these texts[64] and, specifically, to define by legislation the "appropriate penal sanctions" applicable to those who have committed the grave infringements established.[65]

This obligation was partially satisfied in the case of Spain through military legislation, but there was still a legal vacuum in the general legal system. It was therefore necessary to bring this legislation up to date by additionally including in the Penal Code certain *delicta iuris gentium* already classified therein by referring it to International Law (genocide, offences against internationally protected persons) and examined up to here, the conduct that implies violation of the provisions of International Humanitarian Law compulsory for Spain insofar as they are integrated in its legal system. This necessity became more urgent after Spain's ratification on 21 April 1989[66], of the two Additional Protocols of 1977. Today, *offences against protected persons and property in the event of armed conflict* (Chapter III of Section XXIV) are classified in the new Penal Code.

It is a novelty introduced in the new Penal Code thanks to a proposal elaborated in the *Centro de Estudios de Derecho International Humanitario* (Centre of Studies of International Humanitarian Law – *CEDIH*) of the Spanish Red Cross.[67] This proposal

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64. Article 1 of the four Geneva Conventions dated 12 August 1949, Article 1.1 of additional Protocol I to these Conventions dated 8 June 1977.

65. Articles 49 of Convention I dated 1949, 50 of Convention II, 129 of Convention III and 146 of Convention IV (first paragraph of all). It was not necessary to repeat this obligation in Protocol I given its additional characteristic as regards the four Conventions notwithstanding which this Protocol includes the duty of participant States to "repress grave infringements" (Article 86.1).

On the other hand, the Conventions as well as Protocol I consolidate the possibility of incriminating and punishing the guilty of these acts by incorporating several clauses that in general correspond to the principle *aut dedere aut iudicare* (second paragraph of Articles 49 of Convention I, 50 of Convention II, 129 of Convention III and 146 of Convention IV; Article 88 of Protocol I).

66. *BOE*, 26 July 1989.

67. The text of this proposal, under the title "Propuesta de modificación del ordenamiento penal español, como consecuencia de la ratificación por España de los protocolos de 1977 adicionales a los Convenios de Ginebra de 1949", may be seen in *Revista Española de Derecho Militar*, n. 56/57 (July–December 1990/January–June 1991), pp. 693–845.

The proposal was prepared by a commission of experts of the *CEDIH* chaired by M. Pérez González and consisting of J. Sánchez Del Río y Sierra, J.L. Rodríguez-Villasante Prieto, F. Pignatelli Meca, F.J. Pulgarim de Miguel and M. Antón Ayllon.

came in response to the ICRC's requirement that domestic means of application be adopted in peacetime by the various signatory States of the Geneva Conventions and of its Additional Protocols. Once the contents of this proposal had been assumed by the Spanish Council of Ministers, and when they had been incorporated into the preliminary draft of the new Penal Code sent to Parliament for discussion, the proposal ended up by being included, without amendments and with only slight modifications to the wording, of the punitive text of 1995.

Acceptance of CEDIH's proposal from the legislative angle implies, to our way of thinking, not only the satisfaction of certain requirements for Spain resulting from its ratification of those treaty texts (of which a large extent of the provisions correspond to those of general International Law), but also, especially from a domestic legislative point of view, the assumption of that humanitarian spirit of protection of the person in the face of adverse surrounding circumstances (excesses and deviations of power in some cases, attacks against individual or collective rights resulting from situations of armed conflict in the case under discussion here), inspired by the philosophy of the international movement of the Red Cross and Red Crescent.

On the other hand, and from the point of view of exercising jurisdiction for the persecution of these offences known generically as "war crimes", it is appropriate to state here that, according to Spanish Law, the Organic Law on Judicial Power (*LOPJ*) of 1985[68] declared that Spanish jurisdiction was competent to deal with actions committed by Spaniards or foreigners outside national territory liable to be classified, according to Spanish law, as one of the offences that shonld be prosecuted in Spain (Article 23.4. g) under the generic heading of the *aut dedere aut iudicare* principle in conformity with international treaties or agreements. And this is the case of the grave infringements of the Geneva Conventions and to their Additional Protocol I.[69]

Finally, we must not forget that genocide, classified in its different expressions in Chapter II of Section XXIV of the new Penal Code has, inasmuch as it is one of the characteristic provisions of crimes against humanity, a close link to some criminal acts in the field of International Humanitarian Law (deportation of groups of people or of whole populations – "ethnic cleansing" – sexual assault, indiscriminate attacks, destruction of property indispensable for the civil population's survival), the intention of annihilating the group being what characterizes this classification. However, the fact that genocide may be committed in any circumstance (of peace or war), no doubt justifies its classification separately, which is done in the Penal Code, as we have seen above, in general following the definition provided by the 1948 Convention on the

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68. *BOE*, 2 July 1985 (correction of errors in *BOE*, 4 November 1985).

69. In this context, see J.L. Rodriguez-Villasante y Prieto: "Delitos contra la comunidad internacional", in *Seguridad nacional-Seguridad internacional (VIII Seminario "Duque de Ahumada"..., loc. cit.*, pp. 73–74.

Prevention and Punishment of the Crime of Genocide.

2. *War Crimes in Military Criminal Law*

a) Recent Changes

In the old Military Ordinances, classification of conduct contrary to the laws and customs of war was a constant feature of Spanish Criminal Law. The 1884 Penal Code of the Army, under the specific title of "Offences against *Ius Gentium*", certain acts such as non-compliance with agreements with the enemy were punished and protection was provided to certain persons (prisoners of war, parliamentarians) and property (hospitals, religious buildings, cultural property). The Military Justice Code of the Army of 1890 added punishment for destruction of buildings and property, looting of the inhabitants and hamlets and stripping the wounded, prisoners and the dead. The Military Justice Code of 1945 maintained all these classifications, and added unlawful or undue requisition.[70]

Subsequently, the Military Penal Code approved by Organic Law 13/1985 dated 9 December[71], in force today, in accordance with Articles 69–78, Section II of Book Two under the title "Offences against the Laws and Customs of War", included punishment for a series of acts that constituted infringements of the duties of a soldier in the conduct of hostilities (methods and means of war) or serious violations of the standards that protect the victims of war (the wounded, sick, shipwrecked, prisoners of war, civil population and cultural property). Article 78 added a general residual classification that censures acts contrary to the provisions of international agreements ratified by Spain for the protection of victims of armed conflict, on the conduct of hostilities and for the protection of cultural property in the event of armed conflict.

In spite of the positive impression gained for its effort in covering acts contained in the treaty texts entered into by Spain up to that time, the Military Penal Code of 1985 does not coincide with the contents of the Additional Protocols of 1977, not signed by Spain until 1989.

On the other hand, the Military Penal Code, on trying to classify conduct therein as "exclusively or strictly speaking military offences"[72], in all the classifications of Section II of Book Two, has specified that the author of the offence is a member of the armed forces ("The member of the armed forces who..."), doubtless with the intention of restricting the scope of military jurisdiction. Thus and until entry into force of the regulation of conduct contrary to the laws and customs of war in 1996 and to International Humanitarian Law introduced by the new Penal Code, those acts went

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70. See "Propuesta de modificación..." on this evolution, pp. 705–707.
71. *BOE*, 11 December 1985.
72. Preamble of the Military Code of 1985.

unpunished when they were carried out by non-military persons.[73]

b) Problems that arise from Double Incrimination

Now, when the new Penal Code classified identical or similar acts to those stipulated in the Military Penal Code with the intention of making them punishable in those cases in which the author is a non-military person[74], a repetition in both punitive texts arises. In fact, the difficulty now lies in that, by virtue of the principle of specialty[75], even though indication of the author of those acts has an open character in the Penal Code ("Whosoever..."), as long as the author of the action is a member of the armed forces, the Military Penal Code will be applied.

For this reason and as proposed by an authorized sector of experts in military law[76], the double or parallel classification (Penal Code-Military Penal Code) of some provisions should be avoided, where there is no difference as to the protected legal rights, but there is a difference as to the author of the offence. Keeping this in mind, in order to bring the Military Penal Code into a complementary line with the Penal Code, it would not appear to be reasonable to maintain the present Section II of the former when it is possible to refer the punishment of those acts (which would be executed if that were the case by military jurisdiction) to the latter, by means of a clause of reference in the military text.

An aspect that should not be forgotten in this possible reference of the Military

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73. In this context see J.L. Fernandez Flores: "Delitos contra las leyes y usos de la guerra", in *Comentarios al Código Penal Militar* (Coord. R. Blecua Fraga and J.L. Rodríguez-Villasante Prieto), Civitas, Madrid, 1988, pp. 815–819.

74. Before the Penal Code of 1995, there were no precedents for the regulation of offences against protected persons or property in the event of armed conflict in general legislation, excepting, perhaps, the 1928 Code, where Article 244 punished the conduct of those who, in times of war, did not respect the neutrality of ambulances, hospitals or hospital ships or aircraft, who did not help the wounded or the sick, or who prevented authorized charitable institutions from taking in the wounded, sick or prisoners.

On the other hand, according to J.L. Rodriguez-Villasante Prieto (in "Propuesta de modificación ...", p. 718 and in "Delitos contra la comunidad internacional...", *loc. cit.*, pp. 85--86), some States have justified compliance with their international obligations arguing that the provisions corresponding to the special part of the Penal Code where various common offences are classified (murder, homicide, injury, torture, rape, unlawful detention, theft, larceny, damage, fire, libel, omitting to give aid, coercion, among others), are sufficient; in spite of which the writer maintains that the problem of appropriate punishment for those war crimes would still exist, notwithstanding the great difficulty of subsuming all acts that constitute grave infringements of the 1949 Conventions and of the additional Protocols of 1977 in the common classifications of the Penal Code.

75. In the Code itself (Article 8).

76. Thus, J.L. Rodriguez-Villasante Prieto: "El Código Penal militar en el sistema penal español. Principio de especialidad y concurso de leyes" (pending publication in *Cuadernos de Derecho Judicial*), Consejo General del Poder Judicial, Madrid.

Penal Code to classifications in the Penal Code regarding offences against protected persons or property in the event of armed conflict, is that of the punishment to be imposed. Though, in principle punishment is the same in both systems, the fact that more exemplary conduct is demanded of a member of the armed forces justifies a greater reproach, especially in this type of offence – and consequently a correlative aggravation of the punishment – when the person responsible for the action is indeed a military person.[77]

3. *Penal Protection of Persons and Property in the Event of Armed Conflict*

a) The Condition of Armed Conflict

When it came to classifying infringements against International Humanitarian Law in Spanish legislation, it was the custom to refer to acts committed "in war time".[78]

In the new Penal Code, it is a situation of "armed conflict" that is the point of reference for classification of this kind of offence. This is seen in the title itself of Chapter II of Section XXIV of the Penal Code ("Concerning offences against protected persons and property in the event of armed conflict") and in the initial sentence of Articles 609–614 ("Whosoever, on the occasion of armed conflict...").

We think that the new Penal Code has sensibly maintained the expression "armed conflict", as being more comprehensive of situations where the general use of armed force is more usual (declared war, military occupation of a foreign territory, struggles for national liberation, coercive action by the UN, internal conflicts...)[79], and more appropriate to the terminology of international treaties signed by Spain (Geneva Conventions of 1949 – Articles 2 and 3 – 1977 Additional Protocols, 1954 Convention of the Hague for the protection of cultural property, 1961 Vienna Convention on diplomatic relations – Articles 44 and 45, 1963 Vienna Convention on consular relations – Articles 26 and 27, ...).

When the proposal for a systematic classification of war crimes (what today is Chapter III of Section XXIV of the new 1995 Code) was being prepared for inclusion in the Penal Code, the *CEDIH* of the Spanish Red Cross chose a system that would ensure the punishment of acts identifiable as violations of International Humanitarian

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77. It would be useful to recall here that application of the death penalty, established in military penal legislation exceptionally for certain offences committed in wartime (cf. Article 15 of the Constitution), has been abolished by virtue of Organic Law 11/1995, dated 27 November (*BOE*, 28 November 1995).

78. Article 244 of the 1928 Penal Code, Article 14 of the Military Penal Code in force. The Constitution itself uses the words "wartime" in Article 15 *in fine*.

79. In this context, see O. Casanova y la Rosa, "El Derecho internacional humanitario en conflictos armados (I): objectivos militares, bienes de carácter civil, métodos y medios de combate", in *Instituciones de Derecho internacional publico* (Dir. Manuel Díez de Velasco), 11th edition, Tecnos, Madrid, 1997, pp. 824–825 (Chap. XLIII).

Law regardless of their perpetration in a context of armed national or international conflict. In justification of this progressive classification, Javier Sánchez del Río who was in charge of this part of the proposal, wrote that "precisely based on the constitutional principles that make our country a social and democratic constitutional State, the classification of these offences has been formulated with reference to all kinds of 'armed conflict' – international or otherwise – the intention of which is to repress all kinds of infringements of International Humanitarian Law even when they occur in internal conflicts",[80] adding that, despite neither Article 3, common to the 1949 Geneva Conventions, nor Additional Protocol II of 1977 including any provision whatever on serious infringements and their punishment in a domestic context, "it does not seem that Spain could be exempted from an added obligation that does not result from any international instrument whatever, but from the stipulations of its own Constitution, for it has voluntarily accepted to submit its legislation to principles that are not only legal, but also ethical, and which may be summarized in the idea of prevalence and of the consequent protection of human beings in all circumstances".[81]

In accordance with this philosophy, the classifying technique used in the new Penal Code for this kind of offence relates generally to the individualization of serious infringements included in the corresponding articles of the 1949 Conventions and in Additional Protocol I of 1977 (Articles 49 of Convention I, 50 of Convention II, 129 of Convention III, 146 of Convention IV, 85 and 86 of Protocol I), extending the sanction of those reprehensible acts to any situation of armed conflict.[82]

Lastly, it would be advisable to point out that, from the point of view of the authors of the proposal finally adopted in the new Code, the implicit inclusion of internal armed conflicts covers not only those regulated by Additional Protocol II (Article 1), but also situations included in the area of application of Article 3 common to the four Geneva Conventions.

b) The System of Incrimination in the 1995 Penal Code

Chapter III of Section XXIV of the new Penal Code consists of seven articles (Articles 608 to 614) to which some common provisions must be added (Articles 615 and 616) for all categories regulated in this Section.

The Chapter opens with the definition of protected persons in the event of armed

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80. "Propuesta de modificación ..." *loc. cit.*, p. 715.

81. *Id.*

82. Furthermore, as J. Sanchez del Río has also stated (*loc. cit.*, p. 716), the use of the words "in the event of..." in the definition of different classifications, enables the inclusion of the special case of territorial occupation of areas belonging to an opponent when, once hostilities are over, that occupation is prolonged in time though there really is no further armed combat of any kind.

conflict (Article 608).[83]

Thereafter, the different acts which according to the Convention and to Additional Protocol I constitute "serious infringements" (generically termed by Article 85.5 of Protocol I as war crimes)[84] are classified following a system resulting from the quality of the different protected legal rights. A provision (Article 614) includes in the category of offences – punished, however, with an inferior penalty – certain acts referred to in the Conventions and in Protocol I as "acts contrary to" or simple "infringements", in respect of which the only obligation for States according to the treaty texts is that of adopting the necessary measures to put a stop to them.

This classification system of the Code has with reason been considered a mixed system, consisting of: 1) the definition of protected persons in the event of armed conflict that determines the scope of application of the Chapter related to the international agreements that are binding for Spain; 2) successive specific incrimination of the most characteristic ones, systematized by the importance of the protected Legal rights and following the order resulting from treaty instruments of International Law on armed conflicts (Law of The Hague and Law of Geneva); 3) a remaining classification that closes the Chapter with a generic censure directed at open classifications (Article 614: "any other infringements or acts contrary to the prescriptions of international treaties that have been signed by Spain" and relative to the conduct of hostilities, for the protection of war victims and protection of cultural property in the event of armed conflict); 4) some provisions common to all of Chapter XXIV, establishing the punishment for provocation, conspiracy and proposition to commit the corresponding offences (Article 615) and the aggravated penalization if they are committed by a public authority or civil servant (Article 616).[85]

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83. Article 803 defines protected persons according to the conventional texts to which it refers. The categories therein indicated do not constitute a closed list, for Item 6 of this Article establishes that "any other person being of that condition by virtue (...) of any other International Treaties signed by Spain" should be considered a protected person. This makes inclusion of categories such as those that fall into the field of application of the Convention mentioned, on safety of UN staff and of associated staff approved by Resolution 49/59 dated 9 December 1994 of the UNGA, easier in the future, once this Convention is in force internationally and for Spain. In this context, see J.L. Rodríguez-Villasante Prieto; "Delitos contra la comunidad internacional", in *Seguridad nacional-Seguridad internacional..., loc. cit.*, p. 91–92.

84. Thus, following the order of the corresponding precepts, attacks on life, integrity and survival of protected persons (Article 609) are described, as are the use of prohibited methods and means of war (Article 610), certain very serious infringements directed against civilians, prisoners of war and other categories of protected persons (Article 611), various grave violations of International Humanitarian Law (Article 612) and attacks against cultural property and, in general, against property of civilian characteristics (Article 613).

85. J.L. Rodriguez-Villasante Prieto: "Delitos contra la comunidad internacional", *Seguridad nacional-Seguridad Internacional..., loc. cit.*, pp. 112–113. Also, F. Pignatelli Meca in "Propuesta de modificación ...", loc. cit., pp. 722–725.

Furthermore, from the title itself of Chapter III of Section XXIV of the Code the deduction is that the protected legal rights are either personal (in this case protecting life, physical and mental integrity, health, dignity, freedom, procedural guarantees), or real characteristics (on one hand protecting property whose functional aim is the protection of persons – medical transport, medical and security areas and places, distinctive signs – and on the other, property worth protection owing to its own nature – cultural property, civilian property that does not constitute a military target, non-military ships or aircraft whose destruction or damage is not justified, things belonging to others in identical conditions).

c) Some Observations on these Classifications

Article 609 of the Code provides for punishment of certain serious infringements that entail attacks against legal rights of a personal kind.[86] Together with conduct that involves an injurious result for the integrity of persons, other acts that constitute offences of danger are included in the precept. It must be noted, on the other hand, from the point of view of penalty, the greater punishment for torture in this Article, as compared with that established for torture in Article 174.

Article 610 classifies certain conduct of particular gravity entailing a violation of the general principle, according to which the right of the contenders to chose the methods or means of making war is not unlimited; this principle and the one concerning distinction, is covered by UNGA Resolution 2444 (XXIII) dated 19 December 1968, incorporated in Additional Protocol I of Article 35. This principle of a customary nature and *ius cogens* rank entails among other consequences, the prohibition of resorting to methods or means of war of a kind that cause superfluous evils or unnecessary suffering and those that have been conceived for causing, or those that it is possible to foresee will cause, extensive, lasting and serious damage to the natural environment (paragraphs 2 and 3 of Article 35 of Protocol I).

The courage with which the legislator has incorporated conduct consisting of committing, or giving the order to commit, acts that constitute serious violations of the principle in question, in the Code, should be praised; particularly bearing in mind the difficulty of verifying the concurrence of the circumstances that are at the basis of the offensive act for the person who judges (thus, the causation of "superfluous evils"). From our point of view, the classification contained in Article 610 of the Code should be adjusted to take the specifications made in several provisions of Protocol I (Articles 36, 51, 52, 55, 57) into account in order to ensure the correct application of that principle which restricts the freedom of States in matters concerning the choice of methods and means of war. On the other hand, the person who judges should not

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86. The conventional basis is provided by Articles 50 of Convention I, 51 of Convention II, 130 of Convention III, 147 of Convention IV and 11, 41 and 85 (paragraphs 2 and 3) of Protocol I.

forget the prohibitions or restrictions established in international agreements entered into by Spain[87] or derived from general International Law. Where the specific question of introducing an ecological criterion in Article 610 of the Code is concerned, the legislator, based on the regulation of Article 55 of Additional Protocol I, demands as punishment for this type of act, the concurrence of two conditions: that with such acts extensive, lasting and serious damage has been caused and that the health or survival of the civil population has been risked.[88]

This specific classification covering the infringements committed in a context of internal armed conflict is to be praised, bearing in mind the absence of a ruling prohibiting serious attacks against the environment in Additional Protocol II and in the controversial customary character of that ruling.

Article 611 declares various acts punishable that could be qualified altogether as very grave attacks against protected persons (especially civilians and prisoners of war) carried out in violation of International Law on armed conflicts (Law of The Hague and of Geneva).

In this Article, we must underline the classification of acts consisting of committing or of giving the order to do so, indiscriminate or excessive attacks, or making the civilian population the object of attacks, reprisals or acts or threats of

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87. Thus, the Agreement dated 10 April 1972 on the prohibition of development, production and storage of bacteriological weapons (biological) and toxic and on their destruction (*BOE*, 11 July 1979), the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 10 December 1976 (*BOE*, 22 December 1978), the Agreement dated 10 October 1980 on prohibitions or restrictions in the use of certain conventional weapons which might be considered as excessively noxious or of indiscriminate effects, and their corresponding Protocols (*BOE*, 29 December 1993), the Agreement dated 13 January 1993 on the prohibition of the development, production, storage and use of chemical weapons and on their destruction (*BOE*, 13 December 1996), etc.

We should point out that when ratifying the two 1977 additional Protocols on 11 April 1989 (*BOE*, 26 July 1989), Spain made an interpretative declaration concerning the whole of Protocol I by virtue of which "it is understood that this Protocol, in its specific field, is applied exclusively to conventional weapons, apart from the provisions of International Law applicable to other types of weapons". In the specific case of nuclear weapons, implicit object of this interpretative declaration, we know that the ICJ, in its consultative opinion dated 8 July 1996 (I.C.J., *Reports* 1996), considers the principles of International Humanitarian Law applicable to this type of weapon, (including that which prohibits causing superfluous evils or needlessly aggravating the suffering of opponents) (see paragraphs 74–84 of the consultative opinion) but, we think open to criticism, considers that it does not have sufficient elements for deciding with certainty that the use of such weapons would necessarily be contrary to the principles and rules of the Law applicable to armed conflicts in any circumstance (see paragraphs 90–97).

88. These two conditions, whose concurrence in a specific case could be verified if that were the case, on the basis of observations by international organizations for investigation of the facts, together with the element of intentionality ("conceived for causing or that it is with good reason foreseen that they will cause damages...") determine the serious nature of the infringement. This seriousness explains the severity of the punishment (10 to 15 years imprisonment, apart from the penalty for the results produced).

violence whose main aim is to spread terror (n. 1). This classification, that punishes the violation of basic rules concerning the conduct of hostilities through a "scan" of various provisions of Protocol I (Articles 41, 49, 50, 51 – paragraphs 2, 4, 5 and 6–, 57 – paragraphs 1, 2, 3 and 4–, 85 – paragraph 3: a), b) and c)–, and of Protocol II, (Article 13), definitely takes into account the necessity of guaranteeing respect for the principles distinction (Article 48 of Protocol I), of proportionality (Articles 51, 57 and 85) and of the prohibition of terrorist acts (Article 51).

Also worthy of praise, in particular, is punishment of conduct that consists of depriving a prisoner of war or a civilian[89] of his right to be judged regularly and impartially (n. 3 *in fine* of Article 611), as well as the punishment of infringements of humanitarian rules prohibiting deportation, compulsory displacement, the taking of hostages or illegal detention of any protected person (n. 4), displacement by the occupying power of parts of its own population to the territory it occupies (n. 5) or certain odious acts against the dignity of persons such as racial segregation or other exclusions based on unfavorable distinctions (n. 6).[90]

Article 612 of the new Code has with reason been called a jumble where various serious violations are described – though of a lesser degree than those established in the previous Article – and different acts contrary to International Humanitarian Law are classified.[91] On one hand, the provision protects any of the persons listed in Article 608 in the face of injury, privation, degrading treatment, collective punishment, etc., specially punishing violations of the rules of special protection of women and children; on the other hand, the protectors are protected from the double personal and real angle (medical or religious staff, staff of help organizations, medical units,

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89. It would perhaps have been preferable in this case to use the term of "protected person" for the victim of the offence (cf. Article 85.4, g) of Protocol I), in order to include all the provisions regulated in the two Protocols (Article 75.4 of Protocol I, Article 6 of Protocol II).

90. It should be pointed out that, in general, the new Code considers as an aggravating circumstance of responsibility, committing the offence for racist, anti-Semitic or any other kind of discriminating reason concerning ideology, religion or belief of the victim, ethnic group, race or State to which he belongs, sex or sexual preference, illness or handicap (Article 22, 4); and Article 173 punishes the infliction of degrading treatment that seriously impairs the victim's moral integrity.

91. In this context, J.L. Rodríguez-Villasante Prieto: "Delitos contra la comunidad internacional", *Seguridad nacional-Seguridad internacional...., loc. cit.*, p. 103; and also F. Pignatelli Meca in "Propuesta de modificación ...", loc. cit., pp. 741–742, pointing out that this precept "se incrimina una serie de conductas entre las que no existe otro nexo común de identidad que el de la pena con que puedan, en su caso, ser castigadas", adding that the heterogeneity of these acts (save for those described in 4, 5 and 6) "es absoluta, pues mientras en la normativa internacional humanitaria son consideradas como infracciones graves, otras no pueden sino considerarse 'actos contrarios', además de que tienen por objeto la protección de bienes diversos (la indemnidad jurídica que se confiere a ciertos lugares o elementos, la inmunidad de ciertas personas, los derechos de algunas personas protegidas, el valor o significado de ciertos signos)".

medical transport, different areas or places for the protection of persons – included in the ruling with a *numerus clausus* characteristic owing to the exact correspondence with the provisions established by the 1949 Conventions and in Additional Protocol I); furthermore people who resort to treacherous methods of war such as the incorrect use of signs of protection or badges (specially those of the Red Cross and Red Crescent) or of flags, insignias and other signs of identification of neutral States, UN, etc.

Article 613 protects different categories of property in the event of armed conflict. In conformity with treaty texts in force (above all with the two Additional Protocols and The Hague Convention of 1954), the provision describes types of various acts (attacks, reprisals, acts of hostility, destruction, damage, theft, etc.) for greater reinforcement of penal protection. As for the protected property, there is particular emphasis on cultural property, which is included in the provision by means of careful technical wording, where there is an appropriate combination of the different elements of the classification included in Articles 53 and 85.4 d), of Protocol I and in Article 16 of Protocol II.

Also worthy of mention is the generic inclusion of a protection clause of civilian property, together with specific references to certain properties of these characteristics whose destruction would entail serious harm to the civilian population (property indispensable for their survival, sites or installations that contain dangerous elements).

Finally, Article 614 of the new Code closes Chapter III of Section XXIV by censuring any other infringement or act contrary to the provisions of international treaties ratified by Spain related to the conduct of hostilities and protection of the different categories of persons indicated in the ruling and of cultural property. And though the corresponding provisions of these treaties (paragraph 3 of Articles 49 of Convention I, 50 of Convention II, 129 of Convention III and 146 of Convention IV; Articles 85.1 and 86.1 of Protocol I) do not require any other obligation from party States than that of making these minor acts or infringements cease, Spanish legislation has chosen to consider them within a mixed system already described, which establishes specific classifications in Articles 609--613 and a general residual classification in this Article 614, concerning conduct that involves less serious non-compliance of conduct obligations.

4. Overall Evaluation of the System

We think that inclusion in the new Penal Code of 1995 – without precedents in the Spanish common penal system – of a specific Chapter aimed at the ordered classification of different groups of punishable conducts in the light of the rules of International Humanitarian Law is very positive within the Section devoted to offences against the international community, in view of the necessary criminal

protection of persons and property in the event of armed conflict.

As we have seen, it is a question of a mixed system of classification which, through the general residual classification included in Article 614, recognizes certain conduct as penal which, even if it is not considered as a serious infringement in International Humanitarian Law, does endanger certain basic rights of persons who should be respected in all circumstance (peace and war).

On the other hand, the conceptual reference to "armed conflict" enables the legislator to cover the whole spectrum of situations of warlike violence included by treaty texts of International Humanitarian Law and, particularly, it enables the extension of protection to persons and property within this section of International Law, to armed conflict not of an international character, so that war victims will always be entitled under all circumstances to identical protection in the face of identical violations of International Humanitarian Law, notwithstanding the nature, international or domestic, of the conflict in question. On the part of Spain, this implies that certain rules for the protection of persons and property in situations of internal conflict are an integral part of general International Law and are compulsory *per se*, regardless of their inclusion in treaty texts.

Lastly, as already mentioned, classification in the 1995 Penal Code of offences against protected persons and property in the event of armed conflict has at last answered a vacuum in the Spanish legal system – partially covered by military Legislation (the Military Penal Code of 1985) – given that, in view of the lack of censure of these acts in the Penal Code, war crimes were not specifically punished when the victim was not a member of the armed forces. Still pending a solution are the problems that arise from double incrimination or parallel classifications. This would seem to advocate the cancellation of detailed description of these acts in the Military Penal Code, which should be replaced by a generic reference to the corresponding chapter of the new Penal Code.

Otherwise, we should recall that Chapter II of Section XXIV of the new Code classifies genocide in its different forms. Punishment of genocide as one of the characteristic figures of crimes against humanity, has an evident relationship with the classification of serious violations of International Humanitarian Law, since genocide can be committed either in a context of peace or war and certain violations of applicable humanitarian laws in situations of armed conflict – such as deliberate attacks against the civilian population or forcible massive deportations or displacements – may be considered genocide if the intention of totally or partially destroying the group is present (Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, Article 607 of the new Spanish Penal Code)[92].

92. Consequently, the appropriate classification for these violations if the destructive intention coincides, by application of the principle of specialty in the case of a coincidence of offences (Article 8, rule 1, of the Code), is genocide.

However, the applicable ruling to both categories of offence is quite different. In fact, such an institution simply does not apply in cases of genocide. As we recalled above, the Spanish Legislator has upheld the imprescriptibility of the offence of genocide and of the penalties imposed in the 1995 Code, but it has not included a parallel provision for offences committed against protected persons and property in the event of armed conflict.[93] It may be a question of a choice of legislation or mere forgetfulness, and even though there may be reasons for and against the inclusion of a clause to prevent the prescription of conduct contrary to certain basic rules of International Humanitarian Law (a sign is visible in this last sense in the failure of the Convention on the imprescriptibility of war crimes), we think that a declaration that has the effect of excluding the possibility of prescription should be included in future, on the occasion of a review of war crimes in the Code. The inclusion of this exceptional treatment for offences committed in the event of armed conflict that have particularly serious characteristics (the penalty imposed in each typical case may be the clearest indication of possible differentiation in this respect) would achieve harmony with the fact of imprescriptibility already provided for in that category of crimes against humanity.[94]

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93. See III.B of this paper.

94. However, we do not think that imprescriptibility should be included for the offences established in Chapter I of the same Section XXIV of the Code, i.e. the ones classified under the title of Offences against *Ius Gentium* (vid. paragraph III.A of this paper). It would appear appropriate to indicate here that during the preparation of the New York Convention on the Prevention and Punishment of Offences against Internationally Protected Persons including diplomatic officials, it reached a point where they discussed if penal action resulting from the offences classified therein was not the object of prescription (this was how it appeared in the first Draft of Articles prepared by R. Kearney; vid. Article 5, Doc. A/CN.4/L.182, 13 n, *Anuario de la Comisión de Derecho Internacional,* Vol. II, p. 218. This initial proposal had the support of two staunch defenders in the ILC: Sette Cámara and Ushakov. For both, the insertion of a provision of this type was indispensable from the practical point of view, in order to prevent the authors of offences from avoiding a trial, given the transnational and international elements often present in the commission of these offences and also owing to the pernicious effect that such acts always have on the maintenance of good international relations (*cf. id.* p. 237, paragraphs 43–47 and paragraph 52, respectively).

Nevertheless, the solution finally adopted by the Sixth Commission as to remove that clause, which decision we consider well founded. Such a provision (apart from implying interference with a matter pertaining to the policy of each State which, without a doubt would prevent a large amount of support for the Agreement) could enclose, from a technical perspective, a marked elitist character. Certainly, even while recognizing the unquestionable essential and vital characteristic of functions that this category of persons carry out in the maintaining and upholding friendly relations between States and in keeping international peace and security (as the ICJ wanted to reaffirm in various passages of its sentence on the affair of *US Diplomatic and Consular Staff in Teheran* (*vid.* I.C.J, *Reports 1980,* for example, pp. 30–31, paragraphs 61–62; p. 40, paragraph 86; p. 42, paragraph 91), it cannot be ignored that practical reality has shown us how the incidents that have affected this type of person have not always endangered or deteriorated the relations between the States in question; and the opposite: there have been many occasions

To conclude, we wish to point out that the Spanish system of punishment of war crimes is open to collaboration of international jurisdictions. And in this context Organic Law 15/1995 must be mentioned, dated 1 June, for cooperation with the International Court for trial of those presumed guilty of serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia.[95] This law was passed in order to carry out the provisions of paragraph 4 of Resolution 827 (1993) of the UN Security Council, setting up the Court and Article 29 of the Court's own Statute. The Statement of Motives refers to the law being based on "pre-existing international legality of a conventional or common character", which is none other than International Humanitarian Law and, starting from the self-enforcing feature, in a material sense, of a large part of the Court's Statute, it includes only some provisions for its development. Thus the *Audiencia Nacional* is appointed as the competent legal institution for co-operation with the Court (Article 3); in the event of coinciding jurisdiction, a procedural provision is established aimed at inhibiting Spanish courts in favour of the International Court (Article 4), in consonance with the principle of pre-eminence of the jurisdiction of this Court; certain aspects are regulated for the detention of a person residing in Spain against whom the Court has issued an order of detention and directed charges and of delivery to the Court without need for a formal procedure of extradition (Article 6); and finally, rules are established concerning the obligation to appear before the Court, (Article 7) and to execute the penalty in Spain if Article 27 of the Court's Statute (Article 8) is applicable, *i.e.* in the hypothesis that Spain specifically indicates its willingness to be a State where imprisonment may be served.

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on which offences against the freedom or life of internationally unprotected persons have sparked off tremendous international crises between the States involved (remember the *Achille Lauro* Case, as well as *Lockerbie*). On the other hand, we must keep in mind that not all offences classified in the New York Convention and, consequently, also in the 1995 Penal Code are of the same gravity and, therefore, subject to the same degree of penalty and of correlative terms of prescription. It is not only the commission of a homicide or another type of attack against the physical integrity of these persons that is contemplated, but also, for example an imperfect form of offence against the means of transport of such persons. Therefore, a generalized imposition of exclusion of the prescription with respect to any offence aimed, directly or indirectly, against persons worthy of special protection might indicate the use of an excessive technique.

95. *BOE*, 2 June 1994.

Annex I

Proposal for a New Chapter of the Code (CEDIH)

Chapter...: *Offences against protected persons and property in the event of armed conflict*

Article 1

For purposes of the Chapter, protected persons will be taken to be:

- The wounded, the ill or shipwrecked and medical or religious staff protected by Geneva Convention I and II dated 12 August 1949 and by Additional Protocol I dated 8 June 1977.
- Prisoners of war protected by Geneva Convention III dated 12 August 1949 or by Additional Protocol 1 dated 8 June 1977.
- The civil population and civilians protected by Geneva Convention IV dated 12 August 1949 or by Additional Protocol I dated 8 June 1977.
- Non-combatant persons and staff of the Protecting Power and of its substitute, protected by the Geneva Conventions dated 12 August 1949 or by additional Protocol I dated 8 June 1977.
- Parliamentarians and accompanying persons, protected by The Hague Convention II dated 29 July 1899.
- Any other person who has that condition by virtue of Additional Protocol II dated 8 June 1977 or of any other international treaty signed by Spain.

Article 2

Whosoever, in the event of armed conflict maltreats or places in grave danger the health or physical or mental integrity of any protected person, subjects that person to torture or inhuman treatment, including biological experiments, causes that person great suffering o subjects him, even with his consent, to any medical act that is not indicated by that person's state of health and does not conform to generally recognized medical practice that the Party responsible for the act would apply, in identical medical circumstances, to his own nationals not deprived of freedom, will be punished by a penalty of...

Should he cause injuries that in accordance with this Code, constitute an offence, he will be punished by a penalty of...

Should he cause death, a maximum prison sentence will be imposed.

Article 3

Whosoever, in the event of armed conflict, uses or orders the use of prohibited methods or means of combat or those aimed at causing unnecessary suffering or superfluous evils, as well as those conceived for causing or those that with reason are suspected will cause extensive, lasting and grave damage to the natural environment, compromising the health or survival of the population, will be punished by a penalty

of...

In cases of extreme gravity or if the result is death, a maximum prison sentence will be imposed.

Article 4

Punishment by a penalty of ... will be imposed upon whosoever, on the occasion of armed conflict:

Carries out or orders indiscriminate or excessive attacks or makes the civil population the object of attacks, reprisals or acts and threats of violence whose main aim is to terrorize.

Destroys or damages, in violation of the provisions of International Law applicable in armed conflicts, non-military ships or aircraft of an opponent or neutral Party, unnecessarily and without allowing time or without adopting the measures necessary for providing security for persons and for the conservation of documentation on board.

Obliges a prisoner of war or civilian to serve in any manner whatsoever, in the Armed Forces of the opponent Party or deprives that person of his right to be judged regularly and impartially.

Deports, forcibly displaces, takes as hostage or unlawfully detains a protected person.

Transfers and settles in occupied territory the population of the occupying Party, with the intention of living there permanently.

Performs, orders to be performed or maintains, in respect of any protected person, racial segregation conduct and other inhuman and degrading conduct based on other unfavourable distinctions that constitute an outrage to personal dignity.

Unjustifiably prevents or delays liberation or repatriation of prisoners of war or civilians.

Article 5

Punishment by a penalty of... will be imposed upon whosoever, in the event of armed conflict:

Knowingly violates the protection due to medical units and means of transport, prisoner camps, medical and security areas and locations, neutral areas or places of internment of the civilian population, undefended locations and demilitarized zones, known by the appropriate distinctive signs and insignias.

Exercises violence on medical or religious staff or a person from a medical mission or of a help organization.

Gravely offends, deprives of or does not provide indispensable food or necessary medical attention for any protected person or makes that person the object of humiliating or degrading treatment, induced or forcible prostitution or any other

attack on modesty, refrains from informing such persons, without justified delay and in a comprehensible manner, of his situation, imposes collective punishment for individual acts, or violates the provisions for the accommodation of women and children established in international treaties signed by Spain.

1. Unlawfully and treacherously uses the protective or distinctive signs, emblems or insignias established and recognized in International Treaties signed by Spain, specially the distinctive insignias of the Red Cross and Red Crescent.

2. Unlawfully and treacherously uses the flag, uniform, insignia or distinctive emblem of neutral States, of the UN or of other States that are not participants in the conflict or of opponent Parties, during attacks, or to cover, favour, protect or hinder military operations, save in cases expressly established in the international treaties signed by Spain.

3. Unlawfully and treacherously uses a flag of parliament or of surrender, makes an attempt on the inviolability of or unduly retains a parliamentarian or any accompanying person, staff of the Protecting Power or its substitute or a member of the International Commission of Enquiry.

4. Strips the dead, wounded, ill, shipwrecked, prisoner of war or interned civilian of their belongings.

Article 6

Punishment by a penalty of... will be imposed upon whosoever in the event of armed conflict:

Attacks or makes the object of reprisals or acts of hostility any clearly recognized cultural property or places of worship that constitute the cultural or spiritual heritage of the people and that are the object of protection by virtue of special agreements, consequently causing extensive destruction of same and as long as such property is not located in the immediate neighborhood of military objectives or are not used in support of the opponent's military efforts.

Attacks or makes the object of reprisals or acts of hostility any property of a civilian nature belonging to the opposing Party, causing its destruction, as long as it does not provide under the circumstances, a definite military advantage or that such property does not efficiently contribute anything to the opponent's military action.

Attacks, destroys, steals or makes useless indispensable property for the survival of civilians, save that the opponent Party uses such property in direct support of a military action or exclusively as a means of subsistence for members of its armed forces.

Attacks or makes the object of reprisal the sites or installations that contain dangerous elements, when such attacks can produce the liberation of those elements and consequently cause important losses to the civilians, save that such sites or installations be used in regular, important and direct support of military operations and that such attacks were the ouly feasible means of putting and end to such support.

Destroys, damages or seizes, with no military necessity, things that do not belong

to him, obliges another to hand over such things or carries out other acts of pillage.

In cases where specially protected cultural property is in question or in cases of extreme gravity, a higher penalty could be imposed.

Article 7

Whosoever in the event of armed conflict, commits or orders to be committed any other infringement or act contrary to the provisions of international treaties signed by Spain concerning the conduct of hostilities, protection of the wounded, the ill, shipwrecked, treatment of war prisoners, protection of civilians and protection of cultural property in the event of armed conflict, will be punished by a sentence of imprisonment of 6 months to 2 years.

Annex II
Penal Code

Book II: Crimes and their Penalties
Section XXIV:Crimes against the International Community

Chapter I: Offences against Ius Gentium

Article 605

1. Whosoever kills a foreign Head of State, or any other person internationally protected by a Treaty, found in Spain, will be punished by a prison sentence of 20 to 25 years. Should two or more aggravating circumstances concur in the case, imprisonment will be between 25 and 30 years.

2. Whosoever causes injuries as stipulated in Article 149 to persons mentioned in the preceding Article, will be punished by a prison sentence of 15 to 20 years.

In the case of any of the injuries established in Article 150, they will be punished by imprisonment of between 8 to 15 years, and 4 to 8 years in the case of any other injury.

3. Any other offence committed against the persons mentioned in the preceding Articles, or against official buildings, the private residence or the means of transport of such persons will be punished by the penalties established in this Code for the respective offences, of the more severe degree.

Article 606

1. Whosoever violates the personal immunity of the Head of another State or of another person protected by a Treaty, will be punished by a penalty of imprisonment of 6 months to 3 years.

2. When the offences included in this Article and in the preceding one do not have an assigned reciprocal penalty in the laws of the country corresponding to the offended persons, the delinquent will be sentenced to a penalty appropriate to the offence in accordance with the provisions of this Code, if the person offended did not have the of official character mentioned in the preceding Article.

Chapter II: Crimes of genocide

Article 607

1. Whosoever with the purpose of totally or partially destroying a national, ethnical, racial or religious group, commits any of the following acts, will be punished:

1st. By a prison sentence of 15 to 20 years, if any of its members are killed.
If two or more aggravating circumstances concur in the action, a higher penalty will be imposed.

2nd. By a prison sentence of 15 to 20 years if any of its members are sexually attacked or if any of the injuries stipulated in Article 149 were produced.

3rd. By a prison sentence of 8 to 15 years, if the group or any of its members were subjected to conditions of existence that endangered their lives or gravely affected their health, or in the case of any of the injuries stipulated in Article 150.

4th. The same sentence will be imposed if compulsory removals of a group or its members takes place, or if measures that tend to prevent their style of life or reproduction are adopted, or in the case of forcible displacement of individuals from one group to another.

5th. By a prison sentence of 4 to 8 years in the case of any other injury different from those included in 2nd. and 3rd of this section.

2. Propagation by any means of ideas or doctrines that deny or defend the offences classified in the preceding section of this Article, or that seek to rehabilitate a regime or institution that protects the type of conduct that produces such behavior, will be punished by imprisonment of 1 to 2 years.

Chapter III: Offences against Protected Persons and Property in the Event of Armed Conflict

Article 608

For purposes of this Chapter, protected persons are taken to mean:

1st. The wounded, the ill or shipwrecked and sanitary or religious staff, protected by Geneva Conventions I and II dated 12 August 1949 and by Additional Protocol I dated 8 June 1977.

2nd. Prisoners of war protected by Geneva Convention III dated 12 August 1949

or by Additional Protocol I dated 8 June 1977.

3rd. The civil population and civil persons protected by Geneva Convention IV dated 12 August 1949 or by Additional Protocol I dated 8 June 1977.

4th. Non-combatant persons and staff of the Protecting Power and of its substitute, protected by the Geneva Conventions dated 12 August 1949 or by Additional Protocol I dated 8 June 1977.

5th. Parliamentarians and accompanying persons, protected by The Hague Convention II dated 29 July 1899.

6th. Any other person who has that condition by virtue of Additional Protocol II dated 8 June 1977 or of any other international treaty signed by Spain.

Article 609

Whosoever, in the event of armed conflict, maltreats or endangers the life, health or integrity of any protected person, subjects that person to torture or to inhuman treatment, including biological experiments, causes great suffering or subjects that person to any medical act not indicated by that person's state of health nor is in accordance with general recognized medical practice that the Party responsible for those acts would apply, in identical medical circumstances to his own nationals not deprived of freedom, will be punished by a prison sentence of 4 to 8 years, apart from the penalty that could be applicable to the injurious results.

Article 610

Whosoever, in the event of armed conflict, uses or orders the use of prohibited methods or means of combat or those aimed at causing unnecessary suffering of needless evils, as well as those conceived for causing, or those that it is reasonably suspected will cause, extensive, lasting and serious damage to the natural environment, compromising the population's health and survival, will be punished by a penalty of imprisonment of 10 to 15 years, apart from the penalty applicable for possible results.

Article 611

A prison sentence of 10 to 15 years will be imposed on whosoever, in the event of armed conflict, apart from the penalty applicable for possible results:

1st. Carries out or orders to be carried out, indiscriminate or excessive attacks or makes civilians the object of attacks, reprisals or acts or threats of violence whose main object is to terrorize.

2nd. Destroys or damages, in violation of the standards of International Law applicable in armed conflicts, non-military ships or aircraft of an opponent or neutral party, unnecessarily and without allowing time or without adopting the necessary measures to provide for the security of persons and the conservation of documentation on board.

3rd. Obliges a prisoner of war or civilian to serve, in any manner whatsoever, in

the armed forces of the opponent, or deprives him of his right to be judged regularly and impartially.

4th. Deports, forcibly displaces, takes as hostage or unlawfully detains any protected person.

5th. Displaces and settles in occupied territory the population of the occupying Party, for it to live in that territory permanently.

6th. Carries out, orders to be carried out or maintains in respect of a protected person, racial segregation conduct and other inhuman and degrading conduct based on other unfavourable conditions, which imply an outrage against personal dignity.

7th. Unjustifiably prevents or delays the liberation or repatriation of prisoners of war or civilians.

Article 612

A prison sentence of 3 to 7 years will be imposed on whosoever, in the event of armed conflict, apart from the penalty applicable to possible results:

1st. Knowingly violates the protection due to medical units and means of transport, prisoner camps, medical and security areas and locations, neutral areas or places of internment of the civil population, undefended locations and demilitarized zones, known by the appropriate distinctive signs and markings.

2nd. Exercises violence on medical or religious staff or a person from a medical mission or help organization.

3rd. Gravely offends, deprives of or does not provide indispensable food or necessary medical attention for any protected person or makes that person the object of humiliating or degrading treatment, induced or forcible prostitution or any other attack on modesty, refrains from informing such persons, without justified delay and in a comprehensible manner, of his situation, imposes collective punishments for individual acts, or violates the provisions for the accommodation of women and children established in international treaties signed by Spain.

4th. Unlawfully and treacherously uses the protective or distinctive signs, emblems or markings established and recognized in international treaties signed by Spain, specially the distinctive insignias of the Red Cross and Red Crescent.

5th. Uulawfully and treacherously uses the flag, uniform, insignia or distinctive emblem of neutral States, of the UN or of other States that are not participants in the conflict or of opponent Parties, during attacks, or to cover, favour, protect or hinder military operations, save in cases expressly established in the international treaties signed by Spain.

6th. Unlawfully and treacherously uses a flag of parliament or of surrender, makes an attempt on the inviolability or unduly retains, a parliamentarian or any accompanying person, staff of the Protecting Power or its substitute or a member of the International Commission of Enquiry.

7th. Strips the dead, wounded, ill, shipwrecked, prisoner of war or interned civilian of their belongings.

Article 613

A prison sentence of 4 to 6 years will be imposed upon whosoever, in the event of armed conflict:

- Attacks or makes the object of reprisals or act of hostility any clearly recognized cultural property or places of worship, which constitute the cultural or spiritual heritage of the people and which are the object of protection by virtue of special agreements, consequently causing extensive destruction of same and as long as such property is not located in the immediate neighborhood of military objectives or are not used in support of the opponent's military efforts.
- Attacks or makes the object of reprisals or acts of hostility any property of a civilian nature belonging to the opposing Party, causing its destruction, as long as it does not provide under the circumstances, a definite military advantage or that such property does not efficiently contribute anything to the opponent's military action.
- Attacks, destroys, steals or makes useless property indispensable for the survival of civilians, save that the opponent Party uses such property in direct support of a military action or exclusively as a means of subsistence for members of its armed forces.
- Attacks or makes the object of reprisal the sites or installations that contain dangerous elements, when such attacks can produce the liberation of those elements and consequently cause important losses to the civilians, save that such sites or installations be used in regular, important and direct support of military operations and that such attacks were the only feasible means of putting and end to such support.
- Destroys, damages or seizes, with no military necessity, things that do not belong to him, obliges another to hand over such things or commits out other acts of pillage.

In cases where specially protected cultural property is in question or in cases of extreme gravity, a higher penalty conld be imposed.

Article 614

Whosoever in the event of armed conflict, commits or orders to be committed any other infringement or act contrary to the provisions of international treaties signed by Spain concerning tlie conduct of hostilities, protection of the wounded, the ill, shipwrecked, treatment of war prisoners, protection of civilians and protection of cnltural property in the event of armed conflict, will be punished by a sentence of imprisonment of 6 months to 2 years.